IN THE MATTER OF

G.C. THORSEN, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3467. Complaint, Oct. 8, 1993--Decision, Oct. 8, 1993

This consent order prohibits, among other things, an Illinois manufacturer of aerosol cleaning products from representing that any product containing an ozone-depleting substance is ozone friendly or that it will not damage or deplete the ozone in the upper atmosphere and from making environmental benefit claims for any product unless the respondent possesses competent and reliable evidence to substantiate the claims.

Appearances

For the Commission: *Ralph E. Stone* and *Jeffrey Klurfeld.*

For the respondent: *Stephen T. Moore*, *Hinshaw & Culbertson*, Rockford, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that G.C. Thorsen, Inc., a corporation, also trading and doing business as G.C. Electronics, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. G.C. Thorsen, Inc. is a Delaware corporation, with its principal office or place of business at 1801 Morgan Street, Rockford, Illinois.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed computer and office equipment care and maintenance products containing the hydrochlorofluorocarbon ("HCFC") known as chlorodifluoromethane ("HCFC-22") to the public, includ-

ing the aerosol cleaning products known as "Air-Duster" and "Airjet II."

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling and point of sale materials for Air-Duster and Airjet II, including but not necessarily limited to, the attached Exhibits A - C.

The product labeling on the front of the Air-Duster (Exhibit A) and Airjet II (Exhibit B) cans includes the following statements:

> Ozone friendly
> Environmentally responsible

The aforementioned product labeling also includes the following depiction:

The product labeling on the back of the aforementioned cans includes the following statement:

> Contains HCFC-22, an EPA designated product that adheres to the Montreal Protocol in respect for concerns about depletion of the Earth's ozone layer.

The point of sale materials for Airjet II (Exhibit C) include the depiction mentioned above and the following statements:

> Environmentally responsible
> EPA designated CFC replacement
> This is an aerosol that contains HCFC-22 (an EPA designated substitute for CFC's).
> Made with HCFC-22 EPA designated substitute. Formulated with chemistry that satisfies the Montreal Protocol.
> Does not contain CFC's or other ozone damaging components.

PAR. 5. Through the statements referred to in paragraph four in product labeling (Exhibits A and B) and point of sale materials (Exhibit C), respondent has represented, directly or by implication, that:

1. There are no ingredients in respondent's products that deplete the earth's ozone layer.
2. There are no ingredients in respondent's products that harm or damage the environment.
3. HCFC-22 is an EPA-approved chemical or an EPA-approved substitute for CFCs that complies with the Montreal Protocol, and does not contribute to the depletion of the earth's ozone layer.

PAR. 6. In truth and in fact, respondent's products contain the ozone-depleting chemical HCFC-22, a hydrochlorofluorocarbon, which harms or damages the environment by contributing to the depletion of the earth's ozone layer and which is not an EPA-approved chemical or an EPA-approved substitute for CFCs (chlorofluorocarbons) that complies with the Montreal Protocol. Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the statements contained in paragraph four, including but not limited to product labeling attached as Exhibits A and B and point of sale materials attached as Exhibit C, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time it made the representations set forth in paragraph five, the respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

EXHIBIT A

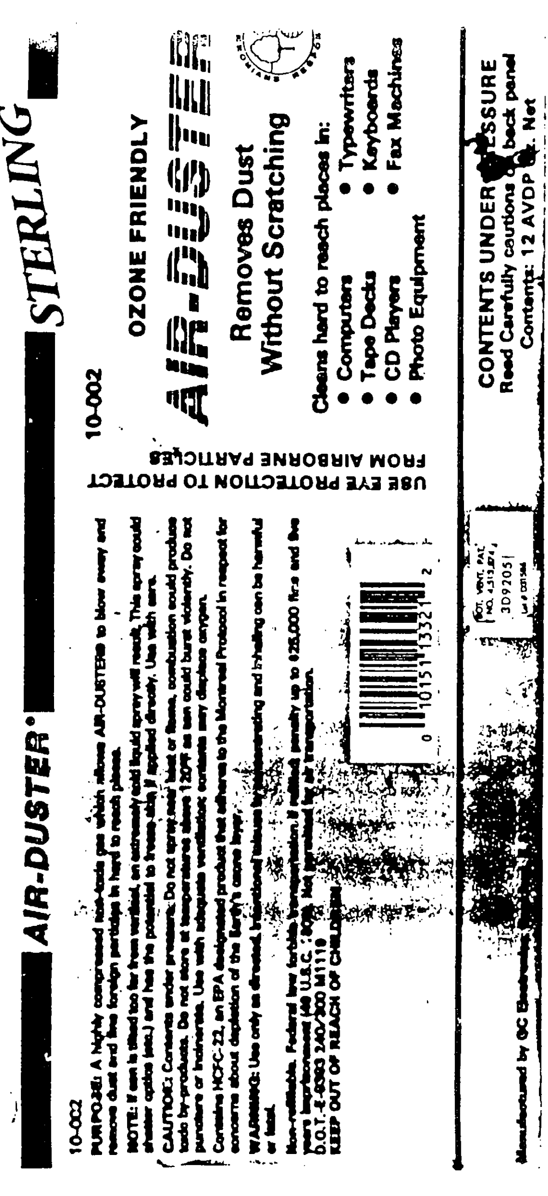


EXHIBIT B

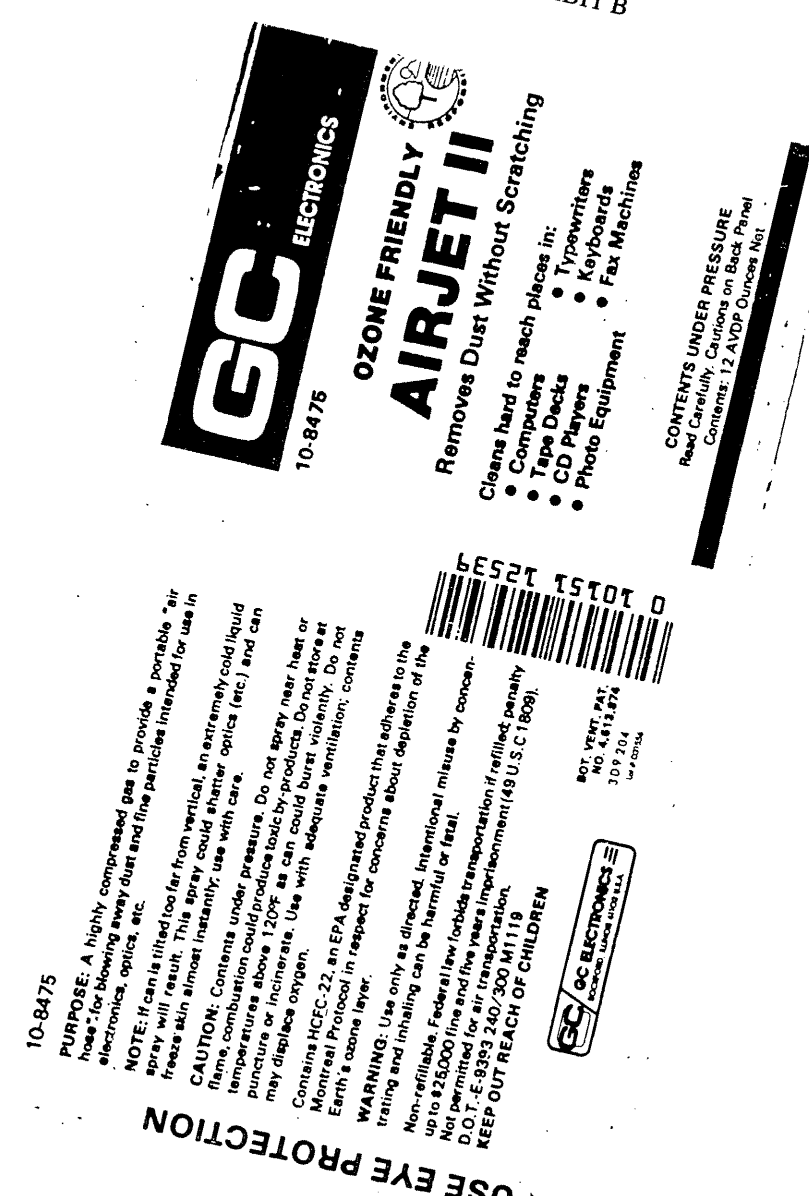


EXHIBIT C

NEW!

Environmentally Responsible

AIRJET II

- Blows away dust, dirt, grit
- Cleans hard to reach places
- Removes dust without scratching
- EPA designated CFC replacement

A miniature and portable "air-compressor" for removing dirt, dust and grit that can not normally be removed or reached easily. This is an aerosol can that contains highly compressed HCFC-22 (an EPA designated substitute for CFC's). Provides a powerful blast of "air". A long extension tube is included for hard to reach places.

Non-toxic, odor-free, and leaves no residue. Provides hundreds of "blasts".

No. 10-8475 12 Oz. Aerosol

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed said agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent G.C. Thorsen, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1801 Morgan Street, Rockford, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

"*Class I ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride and 1,1,1-trichloroethane.

"*Class II ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

I.

It is ordered, That respondent, G.C. Thorsen, Inc., a corporation, also trading and doing business as G.C. Electronics, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any such product containing any Class I or Class II ozone-depleting substance is "ozone friendly," "environmentally responsible," "does not contain CFCs" or "does not contain ozone damaging components," or,

by words, depictions, or symbols representing directly or by implication, that any such product will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere.

II.

It is further ordered, That respondent G.C. Thorsen, Inc., a corporation, also trading and doing business as G.C. Electronics, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any product offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That three (3) years from the date that the respondent makes any representation covered by this order, the respondent shall maintain and upon written request make available to the Federal Trade Commission for inspection and copying:

A. All materials that the respondent relied upon in disseminating any representation covered by this order.

B. All tests, reports, studies or surveys, analyses, or other materials in the possession or control of the respondent that contradict, qualify, or call into question any representation covered by this order or the basis on which the respondent relied for such representation.

IV.

It is further ordered, That the respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements, promotional materials, product labels, or other sales materials covered by this order.

VI

It is further ordered, That the respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SYNCHRONAL CORPORATION, ET AL.

Docket 9251. Interlocutory Order, Oct. 8, 1993

ORDER AMENDING COMPLAINT

It is hereby ordered, That the September 9, 1993, Order Amending Complaint is superseded by the issuance of this order.

Pursuant to the Commission's Order dated August 6, 1993, and complaint counsel's subsequent Motion to Amend Complaint,

It is further ordered, That the amended complaint attached hereto should issue.

It is further ordered, That respondent shall answer the amended complaint within thirty days of service on him.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and Ana Blau a/k/a Anushka, and Steven Victor, M.D., individually, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Synchronal Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. Synchronal produces, distributes, and provides various services for numerous program-length television advertisements, or "infomercials," on its own behalf or for third-party sellers of products and services. These infomercials include "Cellulite Free: Straight Talk with Erin Gray" for the Anushka Bio-Response Body Contouring Program ("the Anushka products"), a purported cellulite treatment; and "Can You Beat Baldness?" for Omexin, a purported treatment for hair loss. Synchronal has also sold various products through telephone solicitations, including Chae Basics, a purported skin treatment. Synchronal Corporation is a wholly-owned subsidiary of Regal Group, Inc.

Respondent Synchronal Group, Inc. ("Synchronal Group"), is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. Synchronal Group is now known as Regal Group, Inc.

Respondent Smoothline Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. It has advertised, offered for sale, and sold the Anushka products.

Respondent Omexin Corporation is a Delaware corporation, with its offices and principal place of business at 1035 Camphill Road, Fort Washington, Pennsylvania. It has advertised, offered for sale, and sold Omexin.

Respondent Ira Smolev ("Smolev") is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation and Synchronal Group. His home address is 120 Meadow Lane, Southampton, New York.

Respondent Richard E. Kaylor ("Kaylor") is or was at relevant times herein an officer and director of Synchronal Corporation, Synchronal Group, Smoothline Corporation, and Omexin Corporation. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corpo-

ration, Synchronal Group, Smoothline Corporation, and Omexin Corporation. His home address is 2 Woodside Lane, Rye, New York.

Respondent Thomas L. Fenton ("Fenton") is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation and Synchronal Group. His home address is 160 East 38th Street, New York, New York.

Respondent Ana Blau a/k/a Anushka ("Blau") is or was at relevant times herein the founder and co-owner of the Anushka Institute. Blau's business address is 241 East 60th Street, New York, New York. Blau aided in the promotion of the Anushka products by providing an expert endorsement of the product on the "Cellulite Free: Straight Talk with Erin Gray" infomercial. In return for her role in marketing the Anushka products, Blau has received remuneration from the manufacturer and/or distributor of the product.

Respondent Steven Victor, M.D. ("Victor") is or was at relevant times herein a medical doctor licensed to practice by the State of New York, with a specialty in dermatology. Victor's business address is 30 East 76th Street, New York, New York. Victor aided in the promotion of Omexin by providing an expert endorsement of the product on the "Can You Beat Baldness?" infomercial. In return for his role in marketing Omexin, Victor has received remuneration from the manufacturer and/or distributor of the product.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed the Anushka products, Omexin, and Chae Basics. These products are foods, cosmetics, and/or drugs, as the terms "food," "cosmetic" and "drug" are defined in Sections 5, 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 45, 52 and 55.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is

defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

The Anushka Products

PAR. 4. Respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have disseminated or have caused to be disseminated advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A, a transcription of the infomercial entitled "Cellulite Free: Straight Talk with Erin Gray." The aforesaid advertisement contains the following statements:

1. Narrator: "The skin is massaged with our body contouring gel which has ingredients like our specially processed French seaweed formula with its unique beneficial properties that really penetrates the skin into the cellulite layer. You can actually feel the gel working as it penetrates into the cellulite. And in days our clients are on their way to being cellulite-free, even after years of living with cellulite." [Exhibit A, p. 8]

2. Vicki: "After the first treatment I was hooked. I really saw a difference immediately. So I did exactly what Anushka told me to do and the cellulite came off rapidly. Each week my hips and thighs looked better. Within six weeks it was all gone...You know, I should also mention that I lost nine pounds and a couple of inches off my hips and thighs." [Exhibit A, p. 10]

3. Gray: "Many doctors and others in the medical profession are enthusiastic about the Anushka program. . . ." [Exhibit A, p. 13]

4. Woman: "Within four weeks I lost inches off my thighs and my thighs looked smoother and firmer. Within six weeks the cellulite was gone." [Exhibit A, p. 30]

5. Woman: "Well, within three months I had not only lost all of my cellulite but I also lost about four inches from my hips and thighs. I lost fifteen pounds and a full dress size." [Exhibit A, p. 29]

6. Announcer: "Now, here's how you can order the really proven way to get rid of cellulite. Just pick up your phone, dial this number and order Anushka's five-and-a-half-minute bio-response body contouring program right now. Imagine opening your package from Anushka and realizing you are on your way to ridding your body of ugly cellulite. In only minutes a day a few days a week. . . . After the first treatment you'll begin to see a difference. You'll be well on your way to a cellulite-free body." [Exhibit A, pp. 18-19, 30-31]

Announcer: "Step one, you massage the unique body contour and seaweed gel which penetrates the open pores of the skin to start attacking those ugly cellulite pockets from the very first treatment. In minutes you'll feel the seaweed

at work. The second step is to take cellulean enzymes to help your body metabolize carbohydrates and help you with your body contouring program. The third step is to apply your Anushka body firming lotion to firm the skin with its deep penetrating action. . . . Call now so you can start the Anushka body contouring program working for you. Get rid of those ugly cellulite pockets once and for all." [Exhibit A, pp. 19-20, 31-32]

7. Marie: "I was very impressed by Anushka's clients because they verified the claims. Also the extensive client charts that showed the proof with numbers, with statistics. And the experts, medical and otherwise that backed up what she was saying. And one thing that is very surprising and I was very, very impressed by it is that one of the key ingredients in her treatment is something as simple as seaweed."

Gray: "Well, tell us, Anushka, is this ordinary seaweed?"

Anushka: "Absolutely not. We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite. . . ."

Gray: "Now tell us, how is it that seaweed effects cellulite?"

Fryda: "Well, I think this diagram will help make it clear. These are cellulite cells with their trapped toxins surrounded by tough connective tissue. Now with cellulite cells the hardened connective tissue won't let these nutrients get to the cells so the trapped toxins cannot be neutralized and taken away. . . . There are other effective ingredients in Anushka's anti-cellulite gel. But seaweed is a key to its success. It's one reason why it's the most powerful anti-cellulite program ever developed." [Exhibit A, pp. 25-27]

8. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

9. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York . . . They urged us to develop a program that could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

10. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

11. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear." [Exhibit A p. 21]

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph

four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause the loss of a substantial amount of weight.

E. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 6. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause the loss of a substantial amount of weight.

E. For thousands of women, Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondent Blau has made statements as an expert endorser in advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A. These statements include the following:

1. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

2. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York . . . They urged us to develop a program that could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

3. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

4. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear." [Exhibit A, p. 21]

5. Anushka: "We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite." [Exhibit A, p. 26]

6. Anuska: "Remember, it's not your fault you have cellulite. Just say to yourself, I don't have to put up with it anymore because now I know what to do. I did it. You can do it too." [Exhibit A, p. 34]

PAR. 10. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 11. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading, and respondent Blau knew or should have known that said representations were, and are, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that at the time she made the representations set forth in paragraph ten, she possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of her represented expertise in cellulite reduction, in the form of an examination or testing of the Anushka products at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 13. In truth and in fact, at the time she made the representations set forth in paragraph ten, respondent Blau did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Blau's representation as set forth in paragraph twelve was, and is, false and misleading.

Omexin

PAR. 14. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have disseminated or have caused to be disseminated advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B, a transcription of the infomercial entitled "Can You Beat Baldness?". The aforesaid advertisement contains the following statements and depictions:

1. Announcer: "The following program will give you news of a product unlike anything else available anywhere for stopping hair loss and actually reversing balding by growing new hair." [Exhibit B, p. 2]

2. John Hylan: "Well, our research is still going on, but, it has gone far enough to show that Omexin works. We know that Omexin really does stop hair loss and does grow hair back." [Exhibit B, p. 7]

3. Announcer: "Omexin has been scrupulously tested by dermatologists, and clinicians, and by thousands of grateful individuals. The test results and the personal stories speak for themselves." [Exhibit B, p. 14]

4. Announcer: "The answer couldn't have been simpler. The Omexin System is based on the Omexin Active Treatment, a fine white cream which you simply massage into the affected areas daily." [Exhibit B, p. 15]

5. Announcer: "Omexin works for the vast majority of people." [Exhibit B, p. 16]

6. Campanella: "It reportedly has stopped the balding process in a high percentage of test subjects and even re-grown healthy new hair for a large number of men and women of all ages." [Exhibit B, p. 17]

7. Campanella: "What are your initial impressions of Omexin?"

Dr. Victor: "[In] Omexin, we have for men and women a new safe product that they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair." [Exhibit B, p. 9]

8. Campanella: "Dr. Wexler, what about your research?"

Dr. Wexler: "We have patients in both a double-blind study and using what we consider to be a very active ingredient, and what we've seen is that patients are ceasing to lose their hair very quickly within starting Omexin and then within a short time after, they start seeing new hair appear. It's not just a fuzz, we're seeing actual pigmented terminal hair, which is very exciting for the patient as well as the doctor." [Exhibit B, p. 10]

9. Hylan: "Now, we don't know if that's the reason Omexin grows hair, but we sure do know that it does."

Campanella: "And can you prove that?"

Hylan: "Absolutely! To prove that Omexin works, we've done thorough, extensive testing using medically sound methods and applying the highest scientific standards." [Exhibit B, p. 7]

PAR. 15. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

E. Omexin has successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

PAR. 16. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost.

E. Omexin has not successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

Therefore, the representations set forth in paragraph fifteen were, and are, false and misleading.

PAR. 17. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph

fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented directly or by implication, that at the time they made the representations set forth in paragraph fifteen, they possessed and relied upon a reasonable basis for such representations.

PAR. 18. In truth and in fact, at the time they made the representations set forth in paragraph fifteen, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. Respondent Victor has made statements as an expert endorser in advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B. These statements include the following:

1. Dr. Victor: "Then, on the other side of the coin, we have very controlled scientific studies. We have 2 groups. We actually take the men who are bald. We tattoo their scalp and we have them apply the Omexin in the balding area every day, twice a day. Now, every month they come back and we count the number of hairs that grow in the area where we tattooed their scalp . . . So far the studies have shown that these men are growing new hair." [Exhibit B, pp. 8-9]

2. Dr. Victor: ". . . basically, the majority of patients get a good result within 3 weeks." [Exhibit B, p. 11]

3. Dr. Victor: "Now, Omexin is a product that can stop hair loss and grow hair for a vast majority of people." [Exhibit B, p. 19]

4. Dr. Victor: "What is particularly good about Omexin, for a man or a woman in their 30's or 20's, with just beginning to thin. If they start using the product religiously, they can stop the hair from falling out. And they can retain the hair they have and remain that way for the rest of their lives." [Exhibit B, p. 20]

5. Dr. Victor: "I think in Omexin, we have for men and women, a new safe product they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair." [Exhibit B, p. 20]

PAR. 20. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph

nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost in a large majority of balding men and women.

PAR. 21. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

Therefore, the representations set forth in paragraph twenty were, and are, false and misleading, and respondent Victor knew or

should have known that said representations were, and are, false and misleading.

PAR. 22. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that at the time he made the representations set forth in paragraph twenty, he possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of his represented expertise in the treatment of hair loss, in the form of an examination or testing of Omexin at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 23. In truth and in fact, at the time he made the representations set forth in paragraph twenty, respondent Victor did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Victor's representation as set forth in paragraph twenty-two was, and is, false and misleading.

Deceptive Format

PAR. 24. Through the advertising and dissemination of "Cellulite Free: Straight Talk with Erin Gray," respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have represented, directly or by implication, that "Cellulite Free: Straight Talk with Erin Gray" is an independent television program and is not paid commercial advertising.

PAR. 25. In truth and in fact, "Cellulite Free: Straight Talk with Erin Gray" is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

PAR. 26. Through the advertising and dissemination of "Can You Beat Baldness?" respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev., Kaylor, and Fenton have represented, directly or by implication, that "Can You Beat Bald-

ness?" is an independent television program and is not paid commercial advertising.

PAR. 27. In truth and in fact, "Can You Beat Baldness?" is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph twenty-six was, and is, false and misleading.

Consumer Testimonials

PAR. 28. Through the advertising and dissemination of "Cellulite Free: Straight Talk with Erin Gray," respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Anushka products reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 29. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for the Anushka products do not reflect the typical or ordinary experience of members of the public who have used the products. Therefore, the representation set forth in paragraph twenty-eight was, and is, false and misleading.

PAR. 30. Through the advertising and dissemination of "Can You Beat Baldness?" respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for Omexin reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 31. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for Omexin do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph thirty was, and is, false and misleading.

Automatic Shipment and Unordered Merchandise

PAR. 32. In the advertising and sale of the Anushka products, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed consumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 33. By and through the acts and practices alleged in paragraph thirty-two, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, and Kaylor have mailed or caused to be mailed supplies of the Anushka products to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 34. In the advertising and sale of Omexin, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed con-

sumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 35. By and through the acts and practices alleged in paragraph thirty-four, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, and Kaylor have mailed or caused to be mailed supplies of Omexin to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 36. Respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have promoted, offered for sale, and sold Chae Basics through telephone solicitations of consumers identified from their purchases of other products sold through advertisements produced or disseminated by Synchronal Corporation or Synchronal Group. In numerous instances in the course of these telephone solicitations, respondents' agents have represented, directly or by implication, that consumers would be sent a free supply of Chae Basics.

PAR. 37. In truth and in fact, in numerous instances the supply of Chae Basics sent to consumers as described in paragraph thirty-six was not free, in that consumers' credit card accounts were billed

a charge for the product. Therefore, the representations set forth in paragraph thirty-six were, and are, false and misleading.

PAR. 38: In the solicitation of orders by telephone of Chae Basics, respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have in numerous instances billed the credit card accounts of consumers who agreed to the receipt of a supply of the product that was represented as free, have automatically shipped additional supplies of the product to consumers without their express consent, and have automatically billed consumers' credit card accounts for these latter shipments without the consumers' express knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 39. By and through the acts and practices alleged in paragraph thirty-eight, respondents Synchronal Corporation, Synchronal Group, Smolev, and Kaylor have mailed or caused to be mailed supplies of Chae Basics to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers and constitute unfair and deceptive acts or practices.

PAR. 40. By and through the acts and practices alleged in this complaint, respondents have violated Sections 5(a) and 12 of the Federal Trade Commission Act and the provisions of the Postal Reorganization Act, 39 U.S.C. 3009, by directly or indirectly engaging in unfair or deceptive acts or practices, by disseminating false advertisements in or affecting commerce, and by acting in concert with other, or knowingly and substantially assisting others to employ

the violations set forth above by providing the means and instrumentalities for the commission of such unfair or deceptive acts or practices.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the _______ day of ____________________________, A.D. 19__ , at _____a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place the respondent remaining in adjudication (hereinafter "respondent Thomas L. Fenton" or "Thomas L. Fenton")[1] will have the right under said Act to appear and show cause why an order should not be entered requiring him to cease and desist from the violations of law charged in the complaint.

Respondent Thomas L. Fenton is hereby notified that the opportunity is afforded him to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon him. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if respondent Thomas L. Fenton is without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If respondent Thomas L. Fenton elects not to contest these allegations of fact set forth in the complaint, the answer shall consist of a statement that he admits all of the material allegations to be

---

[1] This matter has been withdrawn from adjudication as to respondents Synchronal Corporation; Synchronal Group, Inc.; Smoothline Corporation; Omexin Corporation; Ira Smolev; Richard E. Kaylor; Ana Blau, a/k/a Anushka; and Steven Victor, M.D. On October 1, 1993, the Commission accorded final approval to a consent order with these respondents. This matter remains in adjudication only as to respondent Thomas L. Fenton.

true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of the right of respondent Thomas L. Fenton to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to respondent Thomas L. Fenton, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission had reason to believe should issue if the facts were found to be as alleged in the original complaint,[2] and includes provisions which the Commission has reason to believe should issue against respondent Thomas L. Fenton if the facts are found to be as alleged in this amended complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceeding in this matter as to respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., that the order might be inadequate to fully protect the consuming public, the Commission may order such relief as it finds necessary or appropriate.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships, and corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in Section

---

[2] In addition, the Commission had reason to believe that, as to respondent Ira Smolev, if the facts were found to be as alleged in the complaint, it would have been appropriate to include in the final order additional provisions that would require respondent Smolev, as a condition of doing business, to obtain a bond in such circumstances and under such conditions as the Commission shall determine.

19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

ORDER

For the purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

2. "*Shipping*" shall mean sending, or causing to be sent, any product or products by mail, by carrier, or by any other means.

3. "*Continuity program*" shall mean any plan, arrangement, or system by which a consumer is periodically shipped a product or products, and is charged by credit card or otherwise billed for each shipment.

4. "*Expressed consent*" shall mean the affirmative agreement of the consumer to the terms and conditions of a continuity program obtained only after a description of the material conditions and terms of the continuity program, and the material duties and obligations of a subscriber thereto, have been clearly and prominently provided to the subscriber, and shall not be construed to allow the interpretation of a consumer's silence as affirmative agreement to the material terms and conditions of any continuity program.

5. "*Subscriber*" shall mean any person who has given his or her expressed consent to receive the benefits of and assume the obligations entailed in any continuity program.

6. "*Video advertisement*" shall mean any advertisement intended for dissemination through television broadcast, cablecast, home video, or theatrical release.

I.

It is ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Ana Blau a/k/a Anushka, and Steven Victor, M.D., individually; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole:

A. The program-length television advertisement for the Anushka Bio-Response Body Contouring Program described and identified in the complaint as "Cellulite Free: Straight Talk with Erin Gray;" or

B. The program-length television advertisement for Omexin described and identified in the complaint as "Can You Beat Baldness?"

II.

It is further ordered, That respondents, Synchronal Corporation, Synchronal Group, Inc., and Smoothline Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation

and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Anushka Bio-Response Body Contouring Program or any other substantially similar cellulite treatment product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Such product or service contains any ingredient that can or will substantially reduce or eliminate cellulite from the body;
2. Users of such product or service can or will achieve a visible reduction in cellulite after a single or a few treatments;
3. Use of such product or service can or will cause a substantial reduction in the size of the hips and thighs;
4. The use of such product or service can or will cause the loss of a substantial amount of weight; or
5. For thousands of women, such product or service has substantially reduced or eliminated cellulite from the body.

For purposes of this order a "substantially similar cellulite treatment product or service" shall be defined as any product or service that is advertised to treat, reduce, or eliminate cellulite from the body through the application of ingredients to the skin and that contains or purportedly contains seaweed or any extract thereof as an ingredient.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. The use of such product or service can or will reduce or eliminate cellulite from the body;

2. The use of such product or service can or will cause a reduction in the size of the hips or thighs;

3. The use of such product or service can or will enable users to lose weight; or

4. The use of such product or service can or will achieve any reduction of cellulite, reduction in the size of the hips or thighs, or any loss of weight within or for a specific period of time or after a specific number of treatments, unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondent Ana Blau a/k/a Anushka and her agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of the Anushka Bio-Response Body Contouring Program or any other substantially similar cellulite treatment product or service, as that term is defined in part II.A herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Such product or service contains any ingredient that can or will substantially reduce or eliminate cellulite from the body; or

2. For thousands of women, such product or service has substantially reduced or eliminated cellulite from the body.

B. Representing, directly or by implication, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. The use of the product or service can or will reduce or eliminate cellulite from the body;
2. The use of the product or service can or will cause a reduction in the size of the hips or thighs;
3. The use of the product or service can or will enable users to lose weight; or
4. The use of the product or service can or will achieve any reduction of cellulite, reduction in the size of the hips or thighs, or any loss of weight within or for a specific period of time or after a specific number of treatments, unless such representation is true and unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For the purposes of part III of this order, "competent and reliable scientific evidence" shall mean for any expert endorsement an actual exercise of the endorser's represented expertise in cellulite reduction, in the form of an examination or testing of the products or services at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the representation.

IV.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal

Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Omexin or any other substantially similar hair loss treatment product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Such product or service contains an ingredient that can or will curtail hair loss for a large majority of balding men and women;

2. Such product or service contains an ingredient that can or will promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of men and women;

3. Such product or service contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of men and women;

4. Such product or service contains an ingredient that has been scientifically proven to promote the growth of new, pigmented terminal hairs where hair has previously been lost for a large majority of men and women; or

5. Such product or service has successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

For purposes of this order a "substantially similar hair loss treatment product or service" shall be defined as any product or service that is advertised or intended for sale over-the-counter to treat, cure or curtail hair loss and which contains omentum or any extract thereof.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as "commerce" is defined in The Federal Trade Commission Act, that:

1. The use of the product or service can or will prevent, cure, relieve, reverse, or reduce loss of hair;
2. The use of the product or service can or will promote the growth of hair where hair has already been lost;
3. The product or service is an effective remedy for hair loss in a substantial number of cases; or
4. Any test or study establishes that the product or service relieves, cures, prevents or reverses hair loss, unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, *provided that*, this subpart shall not limit the requirements of part IV.A and B herein.

V.

It is further ordered, That respondent Steven Victor, M.D., and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Omexin or any other substantially similar hair loss treatment product or service, as that term is defined in part IV.A herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Such product or service contains an ingredient that can or will curtail hair loss for a large majority of balding men and women;

2. Such product or service contains an ingredient that can or will promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a significant number of balding men and women;

3. Such product or service contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of men and women;

4. Such product or service contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of men and women; or

5. Such product or service has successfully curtailed hair loss and promoted hair growth for thousands of balding men and women.

B. Representing, directly or by implication, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. The use of the product or service can or will prevent, cure, relieve, reverse, or reduce loss of hair;

2. The use of the product or service can or will promote the growth of hair where hair has already been lost;

3. The product or service is an effective remedy for hair loss in a substantial number of cases; or

4. Any test or study establishes that the product or service relieves, cures, prevents, or reverses hair loss,

unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For the purposes of part V of this order, "competent and reliable scientific evidence" shall mean for an expert endorsement an actual exercise of the endorser's represented expertise in the treatment of hair loss, in the form of an examination or testing of the products or services at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the representation.

C. Endorsing, advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, provided that, this subpart shall not limit the requirements of part V.A and B herein.

VI.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation

and Synchronal Group, Inc.; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

VII.

It is further ordered, That respondents Ana Blau a/k/a Anushka, and Steven Victor, M.D., and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

VIII.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; and respondents' agents, representatives and employees, directly or through any partnership,

corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under part VIII.A herein), unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence that substantiates the representation, and that respondent Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and his agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any food, drug or device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless, at the time of making such representation, respondent Thomas L. Fenton possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

IX.

It is further ordered, That respondents Ana Blau a/k/a Anushka, and Steven Victor, M.D., and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the endorsing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under part IX.A herein), unless at the time of making such representation respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence that substantiates the representation.

X.

It is further ordered, That respondents, Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director

of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

XI.

It is further ordered, That respondents, Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service through a continuity program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Selling or distributing or causing to be sold or distributed any product by means of a continuity program without first obtaining the expressed consent of the consumer. Prior to obtaining the consumer's expressed consent, respondents shall convey to the consumer, in the manner set forth in part XI.B herein, all material terms and conditions of the program, including but not limited to:

1. The fact that periodic shipments of the product will be made without further action by the consumer;

2. A description of each product included in each shipment;

3. The approximate interval between each shipment;

4. A description of the billing procedure to be employed, including the total cost to be charged to the subscriber's credit card, or otherwise billed to the subscriber, for each shipment;

5. The minimum number of purchases required under the program, if any; and

6. A description of the terms and conditions under which and the procedures by which a subscriber may cancel further shipments, as set forth in part XI.D herein.

B. Failing to convey the terms and conditions of the continuity program to the consumer in the following manner:

1. For any solicitation initiated or completed by telephone, the terms and conditions set forth in part XI.A.1-6 herein shall be disclosed during that conversation in clear and understandable language;

2. For any solicitation by a print advertisement or direct mail, the terms and conditions set forth in part XI.A.1-6 herein shall be disclosed in a clear and prominent manner in close proximity to the ordering instructions, provided that, if the advertisement or mailing contains an order form or coupon on a separate page or document from the advertising material, the disclosure shall be made both in the advertising materials and on the order form or coupon;

3. For any solicitation by a video advertisement, the following information shall be disclosed in a clear and prominent superscript with a simultaneous voice-over recitation of the superscript, during the presentation of ordering instructions for the product:

A. That the products must be purchased through a continuity program and that periodic shipments of the product will be made without further action by the consumer, if such is the case; and

B. The minimum number of purchases required under the continuity program, if any

C. Once the subscriber has been sent an initial shipment of the product pursuant to a continuity program, failing to send to the subscriber, at least twenty (20) days prior to the mailing date of the next shipment a written statement of the material conditions and terms of the continuity program, and the material duties and obligations of a subscriber thereto, including but not limited to those

described in parts XI.A.1-6 herein. The statement shall be sent by first class mail to each subscriber.

D. Failing to provide in conjunction with each shipment made pursuant to any continuity program a clear and prominent description of the terms and conditions under which and the procedures by which the subscriber may cancel further shipments. Such description shall include either a toll-free "800" telephone number the subscriber may call or a postage-paid mailing the subscriber may return to notify respondents of the subscriber's cancellation of further shipments. *Provided that*, the requirements of this subpart shall not apply to those shipments coming within a minimum purchase requirement to which the subscriber has given expressed consent, except that this subpart shall apply to the last shipment of any minimum purchase requirement.

E. Shipping any product or products to, mailing any bill or dunning communication to, or billing the credit card of any subscriber who, having once subscribed to a continuity program and having fulfilled any minimum purchase requirement to which the subscriber has given expressed consent, notifies respondents by the means described in part XI.D herein, or by any other reasonable means, of the subscriber's cancellation of further shipments.

F. Shipping any products to any consumer who receives the Anushka Bio-Response Body Contouring Program or the Omexin System for Hair pursuant to the terms of any continuity program, without first informing the consumer in writing of the Commission's determination in this case and providing an opportunity to cancel further shipments.

XII.

It is further ordered, That respondents, Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and

director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Shipping products or causing products to be shipped without the expressed, informed request of the recipient unless such merchandise shall have attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift and that the consumer has the right to retain, use, discard, or dispose of it in any manner that he or she sees fit without any obligation whatsoever to the sender;

B. Representing that any person can or will receive a "free sample," "free trial," or other receipt of product at no cost, unless such is the fact.

XIII.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc., and respondents' agents, representa-

tives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless such is the fact.

XIV.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations, their successors and assigns, and their officers; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and Ana Blau a/k/a Anushka, and Dr. Steven Victor, individually, shall, for three (3) years after the date of the last dissemination to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon by respondent(s) in disseminating any representation covered by this order; and

B. All reports, tests, studies, surveys, demonstrations or other evidence in any respondent's possession or control that contradict, qualify, or call into question such representation, or the basis upon which respondent relied upon for such representation, including complaints from consumers.

XV.

It is further ordered, That respondents Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order.

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of respondents' principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

XVI.

It is further ordered, That respondents, Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this order.

XVII.

It is further ordered, That respondents Ira Smolev, Richard E. Kaylor, and Thomas L. Fenton shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his or her duties and responsibilities. The expiration of the notice provision of this part XVII shall not affect any other obligation arising under this order.

XVIII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Oct. 18, 1993

ORDER

On September 24, 1993, counsel for Krajenke Buick Sales, Inc. filed "Respondent's Unopposed Motion to Reconsider Decision as to a Certain Out-of-business Dealership Respondent" requesting that the complaint against Krajenke Buick Sales, Inc. be dismissed and that name be removed from the order of February 22, 1989. The assets of Krajenke Buick Sales, Inc. were sold to a corporation owned by another respondent, and the dealership franchise was terminated. The dealership is no longer in business. Complaint counsel do not oppose the motion.

The Commission has considered the motion and determined to grant it. Accordingly,

It is ordered, That that the complaint against Krajenke Buick Sales, Inc. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete the name of Krajenke Buick Sales, Inc.

IN THE MATTER OF

MCCORMICK & COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3468. Complaint, Oct. 25, 1993--Decision, Oct. 25, 1993

This consent order requires, among other things, the largest spice and seasonings company in the U.S. to divest enough specially-bred seeds to produce a total of 100 million pounds of low-water onions and at least 5,000 pounds of additional onion seeds for future planting, and to provide the Commission-approved purchaser certain technical assistance upon request for one year.

Appearances

For the Commission: *Claudia R. Higgins, Ann B. Malester* and *Steven Newborn.*

For the respondent: *Lewis A. Noonber, Piper & Marbury,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, McCormick & Company, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, acquired certain assets of Haas Foods, Inc., a wholly-owned subsidiary of John I. Haas, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint the following definitions apply:

(a) "*McCormick*" means McCormick & Company, Inc., a corporation organized, existing, and doing business under and by the virtue of the laws of Maryland, its predecessors, subsidiaries, divisions, groups and affiliates controlled by McCormick and their respective directors, officers, employees, agents and representatives acting on behalf of McCormick, and their successors and assigns.

(b) "*Gilroy*" means Gilroy Foods, Inc., a subsidiary of McCormick.

(c) "*Haas Foods*" means Haas Foods, Inc., a subsidiary of John I. Haas, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware.

(d) "*Dehydrated onion business*" means the business of producing and selling dehydrated onion products.

II. THE RESPONDENT

2. McCormick is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its principal offices located at 18 Loveton Circle, Sparks, Maryland.

3. McCormick is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

4. Haas Foods is a corporation organized and existing under the laws of the state of Delaware, with its principal offices located at 1910 Englewood Avenue, Yakima, Washington.

5. Haas Foods is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

6. On or about March 19, 1993, through its subsidiary, Gilroy Foods, Inc., McCormick acquired the assets comprising the Haas Foods dehydrated onion business. The total purchase price was $13,831,250.

V. THE RELEVANT MARKET

7. The relevant line of commerce in which to analyze McCormick's acquisition is the dehydrated onion business.

8. The relevant section of the country is the United States.

9. The relevant market set forth in paragraphs seven and eight is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

10. Entry into the relevant market is difficult.

11. McCormick and Haas were actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

12. The effect of the acquisition has been to substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

(a) Actual competition between McCormick and Haas has been eliminated; and

(b) The likelihood of collusion in the relevant market has increased.

13. All of the above increase the likelihood that firms in the relevant market will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

17. The acquisition described in paragraph six, constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by McCormick & Company, Inc., ("respondent") of certain assets of Haas Foods, Inc., ("Haas Foods") a wholly-owned subsidiary of John I. Haas, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the

executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent McCormick & Company, Inc. ("McCormick") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its principal offices located at 18 Loveton Circle, Sparks, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

A. "*McCormick*" means McCormick & Company, Inc., a corporation organized, existing, and doing business under and by the virtue of the laws of Maryland, its predecessors, subsidiaries, divisions, groups and affiliates controlled by McCormick and their respective directors, officers, employees, agents and representatives acting on behalf of McCormick, and their successors and assigns.

B. "*Gilroy*" means Gilroy Foods, Inc., a subsidiary of McCormick.

C. "*Haas Foods*" means Haas Foods, Inc., a subsidiary of John I. Haas, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware.

D. "*Commission*" means the Federal Trade Commission.

E. "*Acquisition*" means the acquisition by Gilroy of certain assets of Haas Foods relating to the production of dehydrated onions,

which assets are the subject of an asset purchase agreement dated March 19, 1993.

F. "*Acquirer*" means the person to whom McCormick divests the assets herein ordered to be divested.

G. "*Crop Year*" means the year in which a crop is harvested.

H. "*Onions Suitable For Dehydration*" means any variety of onions that has been used by McCormick or Haas Foods for production of dehydrated onion products in crop years 1990 to 1993 and that has an average soluble solids content of no less than the average soluble solids content achieved by McCormick's entire production crop for the crop years of 1990 through 1992, exclusive of the crop acquired through the Acquisition.

I. "*Seed Bank*" means :

1. A quantity of onion seeds of one or more varieties of Onions Suitable For Dehydration in volumes sufficient to yield at least fifty (50) million pounds of Onions Suitable For Dehydration during crop year 1994 (or, if a trustee is appointed under the terms of paragraph III, during the crop year in which divestiture occurs), plus a quantity of onion seed (or, in the case of hybrid varieties, the genetic stock) of one or more varieties of Onions Suitable For Dehydration sufficient to yield at least five thousand pounds of additional onion seed for planting in a future crop year, said onion seed and~or genetic stock to be made available by McCormick during 1993 (or if a trustee is appointed under the terms of paragraph III, during the crop year in which divestiture occurs); and

2. A quantity of onion seeds of one or more varieties of Onions Suitable For Dehydration sufficient to yield at least fifty (50) million pounds of Onions Suitable for Dehydration during crop year 1995 (or if a trustee is appointed under the terms of paragraph III, during the year in which divestiture occurs), said onion seed to be made available by McCormick during 1994 (or if a trustee is appointed under the terms of paragraph III, during the year in which divestiture occurs).

To the extent that hybrid onion seeds are included in the Seed Bank, the genetic stock for such hybrid seeds shall also be included in the Seed Bank. The specific varieties of seeds to be contained in the Seed Bank may vary based on the growing areas to be used by the acquirer.

II.

It is ordered, That:

A. McCormick shall contract to divest, absolutely and in good faith, by auction or otherwise, within four (4) months of the date this order becomes final, a Seed Bank. Delivery of that part of the Seed Bank specified in paragraph I.I.1, shall be made within four (4) months of the date this order becomes final. Delivery of that part of the Seed Bank specified in paragraph I.I.2 may be made up to twelve months following the initial delivery, so long as such later delivery is made at least thirty days prior to the planting date identified by the acquirer.

B. McCormick shall divest the Seed Bank only to a person that receives the prior approval of the Commission and only in a manner that is consistent with the purposes of this order and that receives the prior approval of the Commission. The purposes of the divestiture of the Seed Bank are: (1) to provide the means for establishing an ongoing, viable enterprise to replace the competitive entity eliminated by the acquisition, as alleged in the Commission's Complaint; and (2) to remedy the lessening of competition resulting from the acquisition, as alleged in the Commission's complaint.

C. Upon reasonable advance notice, McCormick shall make employees available to provide technical assistance and advice with respect to the dehydrated onion business to the technical personnel of the acquirer on an "as needed" basis during normal business hours; *provided, however*, that McCormick shall be obligated by this order to provide, at the request of the acquirer, such assistance and advice for no more than one (1) year after delivery of that part of the Seed Bank specified in paragraph I.I.1 and for no more than sixteen

hours per month during the first two months after that delivery and for no more than six hours per month during later months. McCormick may require reimbursement from the acquirer for all its out-of-pocket expenses incurred in providing such assistance and advice to the acquirer. McCormick shall have no obligation to provide the technical assistance and advice required by this paragraph at its facilities located in Gilroy, California. The purpose of providing the technical assistance and advice is to provide the means for establishing an ongoing, viable enterprise to replace the competitive entity eliminated by the acquisition.

III.

It is further ordered, That:

A. If McCormick has not divested the Seed Bank, absolutely and in good faith and with the Commission's prior approval within the four-month period provided for in paragraph II, McCormick shall consent to the appointment of a trustee by the Commission to divest the Seed Bank. In the event the Commission or the Attorney General brings an action pursuant to Section 5 (l) of the Federal Trade Commission Act, 15 U.S.C. 45 (l), or any other statute enforced by the Commission, for any violation of this order, McCormick shall consent to the appointment of one or more trustees in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5 (l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by McCormick to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, McCormick shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of McCormick which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If McCormick has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission of the identity of any proposed trustee, McCormick shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Seed Bank.

3. The trustee shall have twelve (12) months from the date of appointment to divest the Seed Bank. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the twelve (12) month divestiture period for the Seed Bank may be extended; *provided, however*, the Commission may only extend the twelve (12) month divestiture period for up to an additional twelve (12) months.

4. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the Seed Bank, or any other relevant information, as the trustee may reasonably request. McCormick shall cooperate with any reasonable request of the trustee. McCormick shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the Seed Bank. Any delays in divestiture caused by McCormick shall extend the time for divestiture under paragraph III.B.3 in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to McCormick's absolute and unconditional obligation to divest at no minimum price and the purposes of the divestiture as stated in paragraph II.B, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each prospective acquirer for the divestiture of the Seed Bank. The divestiture shall be made in the manner set out in paragraph II; *provided, however,* if the trustee receives bona fide offers from more

than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer selected by McCormick from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of McCormick, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of McCormick, a seed broker and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of McCormick and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Seed Bank.

7. McCormick shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within thirty (30) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, McCormick shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Seed Bank.

12. The trustee shall report in writing to McCormick and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until McCormick has fully complied with the provisions of paragraphs II and III of this order, McCormick shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. McCormick shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of the Seed Bank, including the identity of all parties contacted or that have contacted McCormick. McCormick also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture of the Seed Bank.

V.

It is further ordered, That, for a ten (10) year period beginning on the date this order becomes final, McCormick shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Any equity or other ownership interest in, or the whole or any part of the stock or share capital of, any person or business that has been engaged in any way in the production of more than 2.5 million pounds of dehydrated onion products for sale in the United States during the twelve (12) months prior to the acquisition; or,

(b) Any assets that were used within the previous twelve (12) months in the production of dehydrated onion products for sale in the United States by a person who produced more than 2.5 million pounds of dehydrated onion product during a twelve (12) month period for sale in the United States;

provided, however, that nothing in this order shall prohibit McCormick from acquiring: (1) seeds, onions or dehydrated onion products necessary, in the ordinary course of business, to fulfill its obligations to its customers; (2) dehydrators of other than the belt type being used by onion dehydrators in the United States; or (3) additional equity or other ownership interest in Deshidratadora, S.A. de C.V., a corporation organized and existing under the laws of the United Mexican States, Alimentos Deshidratados Del Bajio, S.A. de C.V., a company organized and existing under the laws of the United Mexican States, or Giza National Dehydration Company, a corporation organized and existing under the laws of the Arab Republic of Egypt. One year from the date this order becomes final and annually thereafter for nine years on the anniversary date of this order, McCormick shall file with the Secretary of the Federal Trade Commission a verified written report of its compliance with this paragraph.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to McCormick, McCormick shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of McCormick relating to any matters contained in this consent order; and

B. Upon five (5) days notice to McCormick, and without restraint or interference from McCormick, to interview officers or employees of McCormick, who may have counsel present, regarding such matters.

VII.

It is further ordered, That McCormick shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, and any other change that may affect compliance obligations arising out of the order.

IN THE MATTER OF

COOPER INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3469. Complaint, Oct. 26, 1993--Decision, Oct. 26, 1993

This consent order requires, among other things, a Texas-based producer of low-voltage industrial fuses, within 12 months, to license certain technology to manufacture the fuses and to divest the necessary tooling, equipment, and machinery to the Commission-approved licensee. The consent order prohibits the respondent from acquiring, without prior Commission approval, any interest in any firm with more than $3.5 million in annual U.S. sales of the fuses, and requires the company to notify the Commission and wait a specified period before acquiring any firm selling less than that amount of fuses.

Appearances

For the Commission: *Howard Morse* and *Wallace W. Easterling*.

For the respondent: *Sean Boland*, *Collier, Shannon, Rill & Scott,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (Commission), having reason to believe that respondent Cooper Industries, Inc. (Cooper), a corporation, through its wholly-owned indirect subsidiary, Cooper (U.K.) Limited, has agreed to acquire voting securities of The Fusegear Group of BTR plc including Brush Fuses Inc. and Hawker Fusegear Limited, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C.

18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Cooper is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at 1001 Fannin, Suite 4000, Houston, Texas.

2. Cooper is a significant manufacturer of low voltage industrial fuses.

3. Cooper is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

4. Cooper has agreed to acquire from BTR plc substantially all of the voting securities of The Fusegear Group for approximately $32 million.

5. BTR plc is a United Kingdom entity involved in, among other things, transportation and related industries. The Fusegear Group of BTR plc has three operating companies: Hawker Fusegear Limited, Brush Fuse Inc., and Connectron Inc. Brush Fuses Inc., a United States entity and part of the Fusegear Group, manufactures low voltage industrial fuses for the United States low voltage industrial fuse market and is headquartered in Glendale Heights, IL, with a contract manufacturing production facility in Nogales, Mexico. Brush Fuse Inc. had 1992 sales of approximately $11 million. Hawker Fusegear Limited, located in the United Kingdom with 1992 sales of approximately $23 million, produces a variety of fuses for

the UK and EEC market, and semiconductor fuses for export into the United States.

III. THE RELEVANT MARKET

6. The relevant line of commerce within which to analyze the effects of Cooper's proposed acquisition of Brush Fuses Inc. is the low voltage industrial fuse market, which consists of designing, manufacturing, marketing, and selling low voltage industrial fuses. Low voltage industrial fuses are expendable devices used to open an electric circuit when the current becomes excessive. Low voltage industrial fuses are used in industrial settings to protect equipment, electrical systems, and people from damage that could result from sustained current overloads.

7. The relevant section of the country or geographic area within which to analyze the effects of the proposed acquisition is the United States.

IV. MARKET STRUCTURE

8. The United States low voltage industrial fuse market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or four-firm concentration ratios and Cooper is the leading producer of low voltage industrial fuses in the United States with approximately 50% of sales in 1993. Cooper and Brush Fuses Inc. constitute two of the three full-line low voltage industrial fuse suppliers in the United States.

V. ENTRY CONDITIONS

9. Entry into the United States low voltage industrial fuse market is difficult, time consuming and unlikely because of patents, proprietary technology, the time needed to design products and obtain Underwriter Laboratories, Inc. certification.

Additionally, firms that are not full-line suppliers of industrial fuses face substantial distribution barriers because distributors will not support manufacturers that do not carry a full-line of low voltage industrial fuses. Non full-line suppliers are further competitively disadvantaged to the extent that they must acquire fuses from full-line suppliers to complete their low voltage industrial fuse product lines.

VI. EFFECTS OF THE ACQUISITION

10. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in the following ways, among others:

(a) It will eliminate actual, direct and substantial competition between Cooper and Brush Fuses, Inc., and increase Cooper's ability unilaterally to exercise market power;

(b) It will substantially increase the already high concentration in the relevant market;

(c) It will raise barriers and impediments to entry into the relevant market; and

(d) It will eliminate BTR's Brush low voltage industrial fuse product line as a substantial independent competitive force in the relevant market.

VII. VIOLATIONS CHARGED

11. The acquisition agreement described in paragraph four of this complaint constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

12. The proposed acquisition of The Fusegear Group from BTR by Cooper, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of respondent's proposed acquisition of the Fusegear Group of BTR plc, and the respondent having been furnished thereafter with a copy of this draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Cooper Industries is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at 1001 Fannin, Suite 4000, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Cooper*" or "*respondent*" means Cooper Industries, Inc., its directors, officers, employees, agents and representatives, its predecessors, successors, assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Cooper Industries, Inc. controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*BTR*" means BTR plc, its directors, officers, employees, agents and representatives, its predecessors, successors, assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that BTR plc controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Brush*" means Brush Fuses Inc., its directors, officers, employees, agents and representatives, its predecessors, successors, assigns, subsidiaries, divisions, and any other corporations partnerships, joint ventures, companies and affiliates that Brush Fuses Inc. controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Fusegear Group of BTR*" means Brush Fuses Inc., Connectron Inc., and Hawker Fusegear Limited.

E. "*Acquisition*" means the acquisition by Cooper from BTR of the voting securities of the Fusegear Group of BTR .

F. "*Low Voltage Industrial Fuses*" means U.L. listed and recognized protective devices that protect circuits of 600 volts or less, that open by the melting of a current sensitive element during specified overcurrent conditions, manufactured by or for Brush during the past three (3) years and which consist of the following fuses: RK5 time

delay, RK1 time delay, L fast acting, L time delay, RK1 fast acting, J fast acting, K5 fast acting, H non delay, T fast acting, cc fast acting, midget time delay, midget fast acting, cable limiters, lift truck fuses and welder limiters. Low Voltage Industrial Fuses do not include fuses that are used to protect semiconductors from excess current.

G. "*Relevant Product*" means U.L. listed and recognized protective devices that protect circuits of 600 volts or less, that open by the melting of a current sensitive element during specified overcurrent conditions, and which consist of the following fuses: RK5 time delay, RKl time delay, L time delay, L fast acting, RK1 fast acting, J fast acting, k5 fast acting, H non delay, T fast acting, cc fast acting, midget time delay, midget fast acting, cable limiters, lift truck fuses and welder limiters. The term "Relevant Product" does not include fuses that are used to protect semiconductors from excess current.

H. "*Commission*" means the Federal Trade Commission.

I. "*U.L.*" means Underwriters Laboratories, Inc.

J . "*Brush Assets*" means:

1. All Brush tooling, dies, and molds used prior to the Acquisition to manufacture Low Voltage Industrial Fuses;

2. All Brush machinery and equipment used prior to the Acquisition to manufacture Low Voltage Industrial Fuses;

3. Existing lists of customers (including, but not limited to, distributors and original equipment manufacturers) that purchased Low Voltage Industrial Fuses from Brush. To the extent possible, such lists should include customers' names, contact persons, addresses, and telephone numbers; and

4. All current Brush promotional materials and selling aids for Low Voltage Industrial Fuses, except that Cooper may delete from such materials any name, trademark or other identification pertaining to any company in the Fusegear Group of BTR plc including but not limited to BTR, Hawker Siddeley, Hawker Fusegear Limited, Hawker, Connectron, Brush Fuses, Inc., Brush or other words similar thereto.

K. "*Brush's Low Voltage Industrial Fuse Technology and Know-how*" means all information technology and documentation owned or controlled by Brush, and in existence prior to the Acquisition, used in the design and manufacture of Low Voltage Industrial Fuses sold by Brush in the United States within the last three (3) years, including, but not limited to:

1. All drawings and blueprints used in the manufacture of Low Voltage Industrial Fuses (whether in hard copy or computer readable formats) and any other information and documentation necessary to manufacture tooling and equipment used to manufacture Low Voltage Industrial Fuses (including all blueprints and drawings for Low Voltage Industrial Fuses, tooling, and equipment);
2. All U.L. documentation relating to all Low Voltage Industrial Fuses, including, but not limited to, (a) all documentation relating to U.L. applications, test procedures and instructions used to obtain and maintain U.L. recognition, listing, approval, or classification for each Low Voltage Industrial Fuse, and (b) all documentation relating to the design, production, assembly methods, processes and systems used for all Low Voltage Industrial Fuses that have received U.L. recognition, listing, approval, or classification;
3. Brush's right to access from U.L. and to use any and all information in the custody of U.L related to the recognition, listing, approval, or classification of Low Voltage Industrial Fuses;
4. All bills of materials, routings for assembly, production and product documentation and descriptions, specifications, patents, trade secrets, and all documentation and information relating to the design, production, assembly methods, processes and systems used to manufacture Low Voltage Industrial Fuses;
5. All other information and documentation relating to the design and manufacture of Low Voltage Industrial Fuses.

L. "*License*" means a perpetual license, without any obligation to pay royalties, at no minimum price, of the right to obtain and use Brush s Low Voltage Industrial Fuses Technology and Know-how to manufacture any and all types of Low Voltage Industrial Fuses

that have been manufactured by or for Brush and sold in the United States within the last three years. Nothing in this definition shall preclude Cooper from seeking payment for the license, consistent with its absolute obligation to grant a license pursuant to paragraph III of the order.

II.

It is further ordered, That within twelve (12) months after the date on which this order becomes final, Cooper shall divest, absolutely and in good faith, the Brush Assets to the licensee to whom the License is granted pursuant to paragraph III of this order and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to assist the licensee to manufacture, distribute and sell a full line of the Relevant Product. Cooper may incorporate tooling, machinery and equipment contained in the Brush Assets into its manufacturing operations, provided, however, that if Cooper elects to incorporate any such tooling, equipment and machinery into its manufacturing operations, Cooper shall divest comparable tooling, machinery and equipment in order to discharge its obligations under this paragraph. In the event that the licensee approved under paragraph III chooses not to acquire the Brush Assets, or acquire any part thereof, Cooper shall not be required to divest such assets. Nothing in this order shall require Cooper to provide the licensee with any right to use or display in any fashion any name, tradename or trademark, of any company within the Fusegear Group of BTR plc including BTR, Hawker Siddeley, Hawker Fusegear Ltd., Hawker, Connectron, Brush Fuses, Inc. or Brush or any word similar thereto.

III.

It is further ordered, That:

A. Within twelve (12) months after the date on which this order becomes final, respondent shall grant a License. Respondent shall grant the License only to a licensee that receives the prior approval of the Commission and only pursuant to a licensing agreement that receives the prior approval of the Commission. The purpose of the License is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the Licensee to manufacture, distribute and sell a full line of the Relevant Product.

B. For a period not to exceed twelve (12) months from the date on which the licensee is approved by the Commission, Cooper shall make available to the licensee, at no cost to the licensee, qualified Brush or Cooper personnel (including, but not limited to, former Brush personnel employed by or under contract to Cooper), assistance, cooperation, and technical support as the licensee reasonably needs, in order (1) to obtain U.L. recognitions, listings, approvals, or classifications (including all necessary transfers of U.L. recognitions, listings, approvals, and classifications) for Low Voltage Industrial Fuses and (2) to manufacture the licensed Low Voltage Industrial Fuses.

IV.

It is further ordered, That, pending divestiture of the Brush Assets and pending granting the License, Cooper shall take such action as is necessary to maintain the Brush Assets in good repair and to preserve Brush's Low Voltage Industrial Fuse Technology and Know-how and shall not cause or permit any destruction, removal, wasting, deterioration or impairment of those assets, except for ordinary wear and tear in the ordinary course of business.

V.

It is further ordered, That, for purposes of protecting interim competition pending the introduction of Low Voltage Industrial Fuses manufactured by the licensee under the License pursuant to

paragraph III of this order, including the licensee's receipt of all the necessary U.L. recognitions, listings, approvals, and classifications required to manufacture and sell Low Voltage Industrial Fuses, respondent shall, for a period of twelve (12) months after the License is granted pursuant to paragraph III of this order, offer the licensed Low Voltage Industrial Fuses to the licensee at Brush's most favorable distributor price available at the time of the Acquisition, including all Brush program pricing and benefits available at the time of the Acquisition. *Provided, however*, that respondent shall not be obligated to supply the licensee in excess of one hundred fifty percent (150%) of Brush's sales of said product in 1992. In the event that Cooper closes Brush's Nogales, Mexico manufacturing facility and Brush fuses are no longer available, Cooper shall provide the licensee with comparable Cooper Relevant Product. If the licensee, exercising reasonable efforts, fails to secure the necessary U.L. recognitions, listings, approvals, or classifications in order to manufacture and sell the licensed Low Voltage Industrial Fuses within twelve (12) months after the date on which the licensee is approved by the Commission, the requirements of this paragraph shall be extended for up to an additional six (6) months pending the licensee's receipt of such listings, approvals, recognitions and classifications.

VI.

A. If Cooper has not fully complied, absolutely and in good faith, with paragraphs II and III and of this order within the time period provided in such paragraphs, Cooper shall consent to the appointment by the Commission of a trustee to grant the License and divest the Brush Assets. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Cooper shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking

civil penalties or any other available relief, including a court-appointed trustee, for any failure by Cooper to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph VI.A. of this order, Cooper shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Cooper, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in divestitures and licensing. If Cooper has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Cooper of the identity of any proposed trustee, Cooper shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to grant the License and divest the Brush Assets, and to make any further arrangements that may be reasonably necessary to maintain the pertinent assets in good repair and to preserve the Brush Low Voltage Industrial Fuse Technology and Know-how.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VI.B.(8) to grant the License and accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of licensing and divestiture or believes that the granting of the License and the divestiture can be accomplished within a reasonable time, the licensing and divestiture periods may be extended by the Commission or, in the case of a court-appointed trustee, by the court.

4. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Brush Assets, or to any other relevant information, as the trustee may reasonably request. Cooper shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any

reasonable request of the trustee. Cooper shall take no action to interfere with or impede the trustee's granting of the License or accomplishment of the divestiture. Any delays in the granting of the License or divestiture caused by Cooper shall extend the time for licensing and divestiture under paragraph VI.B (3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

5. Subject to Cooper's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the License and divestiture. The License shall be granted and the divestiture made in the manner and to the licensee as set out in paragraphs II and III of this order.

6. The trustee shall serve, without bond or other security, at the cost and expense of Cooper, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Cooper, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the License and divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Cooper and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a commission arrangement contingent on the trustee granting the License and divesting the Brush Assets.

7. Cooper shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trusteeship, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. Within ten (10) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, Cooper shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the License and divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VI.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to grant the License and accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Brush Assets.

12. The trustee shall report in writing to Cooper and to the Commission every sixty (60) days concerning the trustee's efforts to grant the License and accomplish divestiture.

VII.

It is further ordered, That:

A. Within thirty (30) days after the date on which this order becomes final, Cooper shall send a copy of this order to all current Brush customers who have purchased $1000.00 or more of Low Voltage Industrial Fuses directly from Brush within the last twelve (12) months.

B. Within sixty (60) days after the date on which this order becomes final and every sixty (60) days thereafter until Cooper has fully complied with the provisions of paragraphs II, III, IV, V, and VI and the above customer notification requirements of this order, Cooper shall submit to the Commission a verified written report

setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Cooper shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the License and divestiture of the Brush Assets, including the identities of all parties contacted. Cooper also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the License and divestiture.

VIII.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Cooper shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, which manufactures (either directly or indirectly), and sells the Relevant Product (other than sales to subsidiaries or divisions of the concern) in or into the United States, with sales of three and a half (3.5) million dollars or more of such products in each of the three (3) years preceding the acquisition; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture and sale in or into the United States of the Relevant Product from any concern, corporate or non-corporate, with sales of three and a half (3.5) million dollars or more of such products in each of the three (3) years preceding the acquisition, except in the ordinary course of business.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Cooper shall file with the Commission a verified written report of its compliance with this paragraph VIII of the order.

IX.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Cooper shall not, without providing advance written notification to the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, which manufactures (either directly or indirectly) and sells (other than sales to subsidiaries or divisions of the concern) Relevant Product, in or into the United States, with sales of less than three and a half (3.5) million dollars of such products in any of the three (3) years preceding the acquisition; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture and sale in or into the United States of Relevant Product from any concern, corporate or non-corporate, with sales of less than three and a half (3.5) million dollars of such products in any of the three (3) years preceding the acquisition, except in the ordinary course of business.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended. Cooper shall provide to the Federal Trade Commission, at least thirty (30) days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in Cooper's possession or reasonably available to Cooper. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of Cooper and of the firm Cooper desires to acquire who negotiated the acquisition. If, within the first waiting period, representatives of the Federal Trade Commission make a written request for additional information and documents, Cooper shall not consummate the acquisition until twenty (20) days after submitting such additional

information and documents. Early termination of the waiting periods in this paragraph may be requested and where appropriate granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1916 (15 U.S.C. 18A). On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Cooper shall file with the Commission a verified written report of its compliance with this paragraph IX of the order.

X.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Cooper, Cooper shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Cooper relating to any matters contained in this order; and

B. Upon five (5) days' notice to Cooper, and without restraint or interference from Cooper, to interview officers or employees of Cooper, who may have counsel present, regarding such matters.

XI.

It is further ordered, That Cooper shall notify the Commission at least thirty (30) days prior to any change in Cooper such as dissolution, assignment, or sale resulting in the emergence of a successor, the creation or dissolution of domestic subsidiaries, or any other change that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today accepts a consent order to remedy the alleged anticompetitive effects of the proposed acquisition by Cooper Industries, Inc., of the industrial fuse business of Brush Fuses, Inc. I agree that there is reason to believe that the acquisition would be unlawful. I do not agree that the proposed remedy is likely to be effective.

The consent order allows Cooper up to twelve months in which to license the technology and know-how to make Brush industrial fuses.[1] A twelve-month interval may be acceptable when the divestiture assets are a going business, but what is involved here is a transfer of parts of a business, to ease start-up costs in an industry in which entry allegedly is difficult, time consuming and unlikely. During the one-year interval permitted under the order (and Cooper presumably has incentives to delay licensing under the order as long as possible), Cooper may shut down the acquired company's production facility, and it may offer its own line of "Brush" brand fuses (as Cooper has announced it will do).[2] In the interim, a substantial independent competitor is eliminated from the market, at least in the short run. As a result, Cooper and other incumbent suppliers have the opportunity to build market share at Brush's expense, and the attractiveness of the license for potential licensees presumably will be reduced.

The failure to require Cooper to license the Brush name further detracts from both the attractiveness and the remedial value of the license. Both the express omission in the order of the usual obligation to license the brand name and the fact that the Brush name was "a hotly contested issue during negotiations"[3] between Cooper and the owner of the name suggest value to Cooper of

---

[1] The order also requires Cooper to divest, at the licensee's option, machinery used by Brush in the manufacture of low voltage industrial fuses, but these are discrete assets. This is not a divestiture of a going business.

[2] Electrical Wholesaling Magazine (August 1993).

[3] Letter from Sean F.X. Boland, Esq., to M. Howard Morse, Esq., at 7 (Aug. 23, 1993) (on the public record in Cooper Industries, Inc., File No. 931-0086).

retaining the name that does not augur well for the competitive prospects of a future licensee. Although the competitive overlap in the industrial fuse market is only a part of a larger transaction, I see no reason to accept a consent agreement that appears unlikely to provide a meaningful remedy when there is no practical impediment to seeking a preliminary injunction.

I dissent.

IN THE MATTER OF

GRACEWOOD FRUIT COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3470. Complaint, Oct. 26, 1993--Decision, Oct. 26, 1993

This consent order requires, among other things, a Florida corporation to have competent and reliable scientific evidence to substantiate future claims that eating normal quantities of grapefruit provides a variety of health benefits, such as reducing serum cholesterol and the risk of stroke, heart attack, and several types of cancer. Also, the respondent is prohibited from misrepresenting any test or study in connection with the marketing of any food.

Appearances

For the Commission: *Anne Maher* and *Lee Peeler.*
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Gracewood Fruit Company ("Gracewood" or "respondent"), a corporation, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Gracewood is a Florida corporation with its principal office or place of business at 1626 90th Avenue, Vero Beach, Florida.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed grapefruit and other products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for grapefruit, including but not necessarily limited to, the attached Exhibits A and B. These advertisements contain the following statements:

A. Now scientists at the University of Florida College of Medicine have "discovered the real health benefits of eating grove fresh Grapefruit" (Exhibit A) or "found that eating fresh Grapefruit can actually be a health benefit." (Exhibit B).

B. "Special News Bulletin: 'A University of Florida researcher reports new evidence that eating citrus pectin' [found in fresh Grapefruit] 'will help keep arteries clear of cholesterol plaque.' - Gainesville Sun" (Exhibits A and B). (emphasis in the originals).

C. "University of Florida studies also showed that test animals, whose diet included only 3% Grapefruit pectin, experienced an average of 50 PERCENT LESS NARROWING OF THE CORONARY ARTERIES than test animals who didn't receive pectin" (Exhibits A and B).

D. "UF scientists also found that dietary Grapefruit pectin had a beneficial effect in lowering blood levels of both cholesterol and low density lipoproteins (LDL)." (Exhibit A).

E. "And the health benefits don't stop there! The Miami Herald also reports that grove-fresh Grapefruit also contains high levels of the nutrient beta carotene, which has been 'linked with lowering the risk of cancers of the mouth, throat, stomach, lungs, colon and esophagus' [Miami Herald, 5/19/91]." (Exhibit A).

F. "Findings from the Physicians Health Study, as reported to the American Heart Association, revealed that men with previous cardiovascular problems who consume elevated levels of beta carotene (such as found in fresh Grapefruit) run about HALF THE RISK OF STROKE AND HEART ATTACK as men who do not." (Exhibit A). (emphasis in the original).

G. "The evidence is in. Now you can start helping yourself to good health, by eating one of our delicious grove-fresh Grapefruit every morning." (Exhibit A). (emphasis in the original).

PAR. 5. The "Physicians Health Study" reported in abstract before the November 12-15, 1990 convention of the American Heart Association to which the advertisement attached as Exhibit A refers

is by Gaziano and others titled Beta Carotene Therapy for Chronic Stable Angina ("Physicians' Health Study").

PAR. 6. The University of Florida studies to which the advertisements attached as Exhibits A and B refer have been reported as Cerda, Robbins, Burgin, Baumgartner, Rice, The Effects of Grapefruit Pectin on Patients at Risk for Coronary Heart Disease Without Altering Diet or Lifestyle, 11 Clinical Cardiology 589 (1988); Cerda, The Role of Grapefruit Pectin in Health and Disease, 99 Transactions Am. Clinical and Climatological A. 203 (1987); Baeky, Cerda, Burgin, Robbins, Rice, Baumgartner, Grapefruit Pectin Inhibits Hypercholesterolemia and Atherosclerosis in Miniature Swine, 11 Clinical Cardiology 595 (1988); Normann, Cerda, Burgin, Robbins, Sullivan, Grapefruit Pectin Inhibits Atherosclerosis in Microswine with Prolonged Hypercholesterolemia, 5(5) FASEBJ A1252, #5112 (1991); and Sullivan, Cerda, Burgin, Robbins, Normann, Grapefruit Pectin Reduces Plasma Total Cholesterol LDL Cholesterol and Retards Atherosclerosis in Microswine with Prolonged Hypercholesteremia, 39(2) Clinical Res. 656A (1991). ("University of Florida Studies").

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that:

A. Eating normal quantities of grapefruit significantly lowers both serum cholesterol and low density lipoproteins ("LDL").

B. Eating normal quantities of grapefruit significantly helps keep arteries free of cholesterol plaque.

C. Eating normal quantities of grapefruit reduces by one half the risk of stroke and heart attack for consumers with previous cardiovascular problems.

D. Eating normal quantities of grapefruit significantly lowers the risk of cancers of the mouth, throat, stomach, lungs, colon and esophagus.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time it made representations set forth in paragraph seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time it made the representations set forth in paragraph seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the University of Florida Studies demonstrate that eating normal quantities of grapefruit significantly lowers both serum cholesterol and LDLs.

PAR. 11. In truth and in fact, the University of Florida Studies do not demonstrate that eating normal quantities of grapefruit significantly lowers both serum cholesterol and LDLs. Among other reasons, the University of Florida Studies were based on clinical trials conducted with concentrated pectin with a higher ration of soluble to insoluble fiber than found in unconcentrated grapefruit pectin, with pectin levels higher than those found in a grapefruit and upon individuals with elevated cholesterol levels. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the University of Florida Studies demonstrate that eating normal quantities of grapefruit significantly helps keep arteries free of cholesterol plaque.

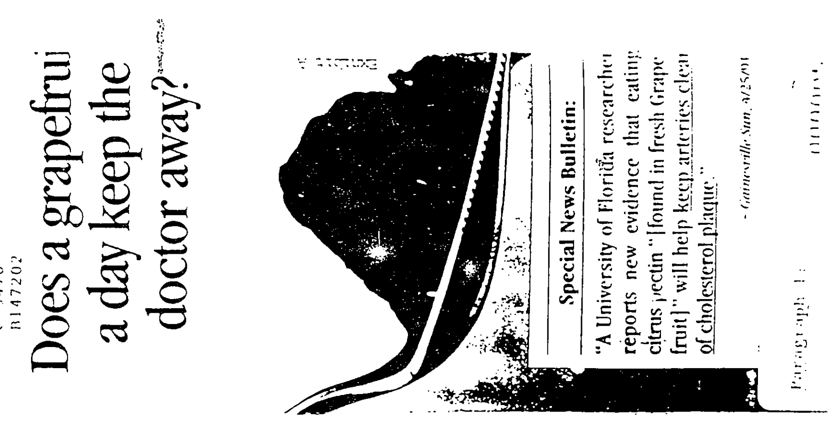
PAR. 13. In truth and in fact, the University of Florida Studies do not demonstrate that eating normal quantities of grapefruit significantly helps keep arteries free of cholesterol plaque. Among other reasons, the University of Florida Studies were based on clinical trials conducted on pigs fed a very high fat diet and given very high levels of pectin. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

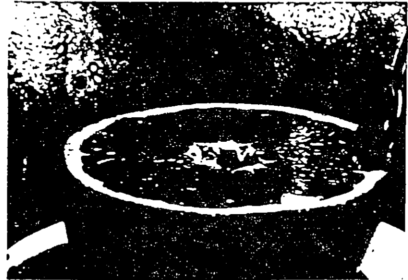
PAR. 14. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the Physicians' Health Study demonstrates that eating normal quantities of grapefruit reduces by one half the risk of stroke and heart attack for consumers with previous cardiovascular problems.

PAR. 15. In truth and in fact, the Physician's Health Study does not demonstrate that eating normal quantities of grapefruit reduces by one half the risk of stroke and heart attack for consumers with previous cardiovascular problems. Among other reasons, the subjects in the Physicians' Health Study consumed substantially higher levels of beta carotene than those found in a grapefruit. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A





itrus pectin found in the sections of fresh Grapefruit will actually
elp keep arteries clear of cholesterol plaque"

Gracewood Fruit Company
1626 90th Avenue
P.O. Box 2506
Vero Beach, FL

ABSOLUTE GUARANTEE OF SATISFACTION

EXHIBIT A

B147202

Who ever thought lowering your cholesterol could be so easy — or taste so good? People all around the world love the taste of premium grove fresh Indian River Grapefruit. Now scientists at the University of Florida College of Medicine have discovered the real health benefits of eating grove fresh Grapefruit.

Citrus pectin, found in the sections of fresh Grapefruit, will actually help keep arteries clear of cholesterol plaque!

Eating fresh Grapefruit makes an amazing difference. University of Florida studies showed that test animals, whose diet included only 3% Grapefruit pectin, experienced an average of 50 PERCENT LESS NARROWING OF THE CORONARY ARTERIES than the test animals who didn't receive pectin. [As reported in the *Gainesville Sun* (a New York Times publication), 4/25/91.]

UF scientists also found that dietary Grapefruit pectin had a beneficial effect in lowering blood levels of both cholesterol and low-density lipoproteins (LDL).

And the ... don't stop there!

The *Miami Herald* reports that grove fresh Grapefruit also contains beneficially high levels of the nutrient beta carotene, which has been "linked with lowering the risk of cancers of the mouth, throat, stomach, lungs, colon and esophagus" [*Miami Herald*, 5/19/91]. Findings from the Physicians Health Study, as reported to the American Heart Association, revealed that men with previous cardiovascular problems who consume elevated levels of beta carotene (such as found in fresh Grapefruit) run about HALF THE RISK OF STROKE AND HEART ATTACK as men who do not. The evidence is in! Now you can start helping yourself to good health, by eating one of our delicious grove fresh Grapefruit every morning.

Good health has never been so delicious!

Now that you know the health benefits of eating grove fresh Grapefruit, we want you to know about our Ruby Red Grapefruit's amazingly delicious flavor.

Why is our Grove-Fresh Grapefruit so much better than store bought?

It's because we hand pick them fresh from our Florida groves, and rush them directly to you. We bring you the pick of the world famous Indian River fruit crop, at its naturally sweet and juicy best. You don't just get the maximum health benefits ... you get the maximum flavor benefits too! Every bite tastes so good, you'll want to eat our grove fresh Ruby Red Grapefruit every morning.

IT'S SO EASY!

1. Pick whatever size suits your family: 1/4 bushel $20.95, 1/2 bushel $27.95 (Free Delivery)
2. Tell us how often you want your delicious Ruby Red Grapefruit delivered, from once a week to once a month. (Or choose our one time shipment.)
3. We never bill you until after each shipment has arrived.
4. And you can cancel your order or skip a shipment at any time. Just give us a call toll free, 1 800 678 1154. You're in charge. You get exactly what you want.

FREE BOX: Congratulations! When you've received 6 boxes of delicious grove fresh Grapefruit, your 7th box is absolutely FREE. It's our special gift to you. (All boxes must be sent to the same address please.)

EXHIBIT B

Call us today for our new catalog featuring a wide diversity of spices, seasonings, special blends, sauces and gift assortments from far and near.

For everything there is a seasoning.

1-800-827-6373

Georgia Pecans & Peanuts

NEW CROP · SHELLED · IN SHELL

Holiday Gifts/ Treats · Cooking

Satisfaction Guaranteed

FREE BROCHURE AND RECIPES

SUN BURST FARMS

Dept. CL, P. O. Box 983

Tifton, GA 31793

TOLL FREE 1-800-358-94?2

WE ACCEPT MASTERCARD AND VISA

World's Finest ESTATE COFFEES & TEAS

ROASTED & SHIPPED DAILY

Hand selected and roasted to perfection using only the finest estate Arabica coffee beans. My family's prized blends bring you 65 of the world's richest, most exclusive coffee varieties and flavors—all affordably priced.

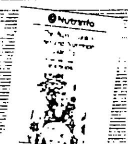
For tea lovers, choose among the finest hot, ice and herbal teas known. In addition, my color catalog offers a full line of coffee brewing systems, tea pots & accessories. Your satisfaction is 100% guaranteed or your money back.

Call or write today **for your FREE CATALOG 1-800-832-4896.**

AMANDA DAVIES

ESTATE COFFEES & TEAS, LTD.

DIET WITH AMERICA'S FAVORITE COOKBOOKS



Take the guesswork out of healthy meal planning with per serving nutrition information plus diabetic exchanges for the recipes in these best selling cookbooks. Our diet guides permit intelligent comparisons and healthy choices. Now make thousands of ... more useful than ever before.

What's In It? guides are available for:

- The Frugal Gourmet
- The New Basics Cookbook
- The New York Times Cookbook
- The Classic Italian Cookbook
- The Silver Palate Cookbook
- Microwave Gourmet
- The Fannie Farmer Cookbook
- The Frugal Gourmet Cooks With Wine
- The Enchanted Broccoli Forest Cookbook
- The Moosewood Cookbook
- The Silver Palate Good Times Cookbook
- The New York Times 60-Minute Gourmet
- Chef Paul Prudhomme's Louisiana Kitchen

Each guide is $4.95 plus $1 shipping & handling. *Money back guarantee.*

To order call 1-800-676-6686 MC/VISA or send check or money order to: Nutrinfo Corporation ...

CALL FOR OUR FREE NUTRITION HANDBOOKS

Nutrinfo

DOES A GRAPEFRUIT A DAY KEEP THE DOCTOR AWAY?

Who ever thought lowering your cholesterol could be so easy – or taste so good? People all around the world love the taste of premium grove-fresh Indian River Grapefruit. Now scientists at the University of Florida College of Medicine have found that eating fresh Grapefruit can actually be a health benefit.

Special News Bulletin:

A University of Florida researcher reports new evidence that eating citrus pectin (found in fresh Grapefruit) will help keep arteries clear of cholesterol plaque.

University of Florida studies also showed that test animals whose diet included only 3% Grapefruit pectin experienced an average of 50 PERCENT LESS NARROWING OF THE CORONARY ARTERIES than the test animals who didn't receive pectin.

Why are our Grove-Fresh Ruby Red Grapefruit so much better than store bought?

It's because we hand pick them – fresh from our Florida Groves. World famous Indian River Ruby Red Grapefruit. Naturally sweet and juicy. Then we RUSH them right from the groves to your door. Good health has never been so delicious!

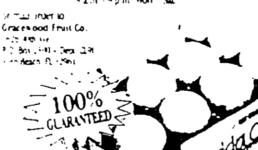
IT'S SO EASY!

Choose between 1/4 bushel $20.95 or 1/2 bushel $27.95 (Free Delivery). Tell us how often you want your delicious Ruby Red Grapefruit delivered, from once a week to once a month (or choose our one-time shipment). We never bill you until after each shipment has arrived. You can cancel your order or skip a shipment at any time.

ORDER TOLL FREE

1-800-678-1154

Or mail order to Gracewood Fruit Co.



DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the above caption, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gracewood Fruit Company (Gracewood) is a Florida corporation with its offices and principal place of business located at 1626 - 90th Avenue, Vero Beach, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order the "Physicians' Health Study" means the study by Gaziano, Manson, Ridker, Buring, Hennekens, Beta Carotene Therapy for Chronic Stable Angina, reported in abstract before the November 12-15, 1990 convention of the American Heart Association.

For purposes of this order the "University of Florida Studies" means the studies reported as Cerda, Robbins, Burgin, Baumgartner, Rice, The Effects of Grapefruit Pectin on Patients at Risk for Coronary Heart Disease Without Altering Diet or Lifestyle, 11 Clinical Cardiology 589 (1988); Cerda, The Role of Grapefruit Pectin in Health and Disease, 99 Transactions Am. Clinical and Climatological A. 203 (1987); Baeky, Cerda, Burgin, Robbins, Rice, Baumgartner, Grapefruit Pectin Inhibits Hypercholesterolemia and Atherosclerosis in Miniature Swine, 11 Clinical Cardiology 595 (1988); Normann, Cerda, Burgin, Robbins, Sullivan, Grapefruit Pectin Inhibits Atherosclerosis in Microswine with Prolonged Hypercholesterolemia, 5(5) FASEBJ A1252, #5112 (1991); and Sullivan, Cerda, Burgin, Robbins, Normann, Grapefruit Pectin Reduces Plasma Total Cholesterol, LDL Cholesterol, and Retards Atherosclerosis in Microswine with Prolonged Hypercholesteremia, 39(2) Clinical Res. 656A (1991).

I.

It is ordered, That respondent Gracewood Fruit Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation,

subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any food in or affecting commerce, as "commerce" and "food" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Eating normal quantities of grapefruit significantly lowers serum cholesterol or low density lipoproteins ("LDL");

B. Eating normal quantities of grapefruit significantly helps keep arteries free of cholesterol plaque;

C. Eating normal quantities of grapefruit significantly reduces the risk of stroke or heart attack for consumers;

D. Eating normal quantities of grapefruit significantly lowers the risk of cancers of the mouth, throat, stomach, lungs, colon or esophagus; or

E. Eating any fruit has a favorable impact on any physiological function or risk factor for a disease, or any other health benefit; unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that any such representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to have a reasonable basis as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent Gracewood Fruit Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any food in or affecting commerce, as "commerce" and "food" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. The University of Florida Studies demonstrate that eating normal quantities of grapefruit significantly lowers both serum cholesterol and low density lipoproteins ("LDL");

B. The University of Florida Studies demonstrate that eating normal quantities of grapefruit significantly helps keep arteries free of cholesterol plaque;

C. The Physicians' Health Study demonstrates that eating normal quantities of grapefruit reduces by one half the risk of stroke and heart attack for consumers with previous cardiovascular problems.

III.

It is further ordered, That respondent Gracewood Fruit Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any food in or affecting commerce, as "commerce" and "food" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by

implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

IV.

It is further ordered, That, for five (5) years after the last date of last dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All test reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from such person a signed statement acknowledging receipt of this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the requirements of this order.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-3132. Consent Order, April 11, 1984--Set Aside Order, Oct. 29, 1993

The Federal Trade Commission has set aside a 1984 consent order with General Motors Corporation, et al., (103 FTC 374), thus removing the Commission's requirement limiting the duration of the joint venture (New United Motor Manufacturing, Inc.) between General Motors Corporation and Toyota Motor Corporation to produce subcompact cars in California. The Commission concluded that changed conditions in the industry warranted reopening and setting aside the order.

ORDER GRANTING PETITION TO REOPEN AND SET ASIDE ORDER

On June 28, 1993, the respondents, General Motors Corporation ("GM") and Toyota Motor Corporation ("Toyota") (hereafter "the respondents"), together with their joint venture, New United Motor Manufacturing, Inc . ("NUMMI"),[1] filed a Petition To Reopen the Proceeding and To Vacate the Consent Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In their Petition, the respondents ask the Commission to reopen he proceeding in Docket No. C-3132 and set aside the consent order issued by the Commission on April 11, 1984, in *General Motors Corporation, et al.*, 103 FTC 374 (1984) ("order"). The Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. Seventeen comments, all in favor of granting the Petition, were received.

After reviewing the Petition and other relevant information, the Commission has determined to grant the Petition. The respondents have shown changed conditions of fact that eliminate the need for

---

[1] NUMMI, the joint venture established by GM and Toyota, is not a respondent under the Commission's order.

the order and make its continued application to the respondents inequitable and harmful to competition.

I. The Complaint and Order and the Respondents' Petition

The Commission's 1984 complaint in this matter alleged that the proposed joint venture between GM and Toyota would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by lessening competition in the "manufacture and sale of small new automobiles . . . includ[ing] . . . subcompact, compact, and intermediate sized automobiles" in the United States and Canada. The complaint alleged, among other things, that the proposed joint venture could lessen competition (1) by expanding the output of the joint venture beyond what would reasonably be necessary to accomplish the legitimate purposes of the joint venture, and (2) by failing to provide adequate safeguards against the exchange of competitively significant information beyond the minimum reasonably necessary to accomplish the legitimate purposes of the venture. These effects, singly or in combination, allegedly would increase significantly the likelihood of noncompetitive cooperation between GM and Toyota.

The Commission's order, issued with the consent of GM and Toyota, permitted them to undertake the joint venture, but limits the scope of the venture and the exchange of information between GM and Toyota and with any joint venture. The order limits the joint venture to manufacturing for, or selling to, GM not more than approximately 250,000 automobiles per year,[2] except with the prior approval of the Commission, and limits the duration of the joint venture to the earlier of twelve years from the start of production or December 31, 1997.

The order limits the exchange of nonpublic information concerning prices and costs of GM or Toyota cars or parts, sales or production forecasts, and marketing plans for any product. In

[2] In addition, the order limits the cars made by the joint venture for GM to cars "derived from the Toyota Sprinter." NUMMI presently makes the Chevrolet Geo Prizm for GM. The order does not similarly limit NUMMI's production for Toyota. NUMMI makes the Corolla and a compact pickup truck for Toyota and also makes automobile parts

addition, the order limits discussions of product designs, sales or production forecasts, and the cost of products supplied by the co-venturers to those "necessary to accomplish, and solely in connection with, the legitimate purposes or functioning" of the joint venture. The order also contains record keeping and other requirements to help monitor the respondents' compliance with the order.

The respondents ask the Commission to set aside the order "in its entirety" to permit GM and Toyota to continue the joint venture. In support of the Petition, the respondents assert, among other things that in the context of what they view as fundamental changes in the market since 1984, setting aside the order's limits on the scope of the joint venture will allow the continuation of important efficiency gains that benefit competition. The respondents also assert that setting aside the order's restrictions on the output of the joint venture and on certain communications would be in the public interest, because the restrictions "are burdens imposed on no other automotive producers and therefore place NUMMI at a serious competitive disadvantage." Petition at 21.

II. Standards for Reopening and Modifying an Order

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage);

Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[3]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 685, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing " of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 95th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the

[3] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc., v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. The Respondents Have Shown Changed Conditions of Fact that Require Reopening the Order, and the Restrictions on the Scope of the Joint Venture Should Be Set Aside

The order limited the scope of the joint venture to preserve the incentives of GM independently to make and sell new automobiles and to prevent noncompetitive cooperation between GM and Toyota. The Commission finds that the respondents have made a satisfactory showing of changed conditions in the North American automobile market that require reopening the order. The Commission also finds that the changed conditions demonstrated by the respondents eliminate the need for the order's restrictions on the duration and the output of the joint venture.

Since 1984, when the order was issued, significant new entry and expansion in the automobile industry have occurred in North America,[4] including the United States, Canada and Mexico.[5]

Sales in the United States of subcompact, compact and midsized automobiles (the product market identified in the complaint) have grown from about 58% to more than 77% of new car sales.[6] In 1984, U.S. car buyers could choose among 16 subcompacts, 14

---

[4] At the same time, new passenger car production in North America has declined from about 8.8 million units (U.S. and Canada) in 1984 to about 7.5 million (U.S., Canada and Mexico) in 1992. Automotive News, 1985 Market Data Book at 4.8 (hereafter "(year) Market Data Book"); 1993 Market Data Book at 4. Total U.S. retail sales of domestic and imported cars were about 10.4 million in 1984 (1985 Market Data Book at 4) and about 9.5 million in 1992. 1993 Market Data Book at 4.

[5] Although Mexico was not in the North American market identified in the complaint, since 1984, cars produced in Mexico have achieved about 10% of U.S. car sales. *See* 1993 Market Data Book at 4.

[6] 1985 Market Data Book at 22; 1993 Market Data Book at 26.4

compact and 24 midsized cars;[7] in 1992, U.S. car buyers could choose among 42 subcompact, 20 compact and 37 midsized cars.[8] GM and Toyota each has made major investments in car production in the United States, outside the NUMMI joint venture. GM has developed new models of its existing lines of cars and introduced the Saturn line of automobiles. Toyota has built two assembly plants in North America and has introduced new vehicles (the Lexus line of automobiles, the T-100 pickup truck and a new larger Camry) to compete with GM's larger cars.

The new automobile market has become less concentrated since 1984.[9] In 1984, GM was the leading maker and seller of cars in the United States, with 44.4% of passenger car sales.[10] Ford (19.26%) and Chrysler (9.51%) were second and third. Toyota, the third largest motor vehicle manufacturer in the world, had 5.4% of U.S. sales. Manufacturing capacity in the United States of foreign automobile producers ("transplant" producers) consisted of two plants, a Honda facility in Ohio and a Nissan truck facility in Tennessee. Imports from countries such as Korea and Mexico were not significant.

In 1992, GM remains the leading producer and seller of automobiles in the United States, with 34.6% of sales.[11] GM is

---

7 *See* 1985 Market Data Book at 12.

8 *See* 1993 Market Data Book at 26. The top selling cars in the United States in 1992 were (1) Ford Taurus, (2) Honda Accord, (3) Toyota Camry, (4) Ford Escort, (5) Honda Civic, (6) Chevrolet Lumina, (7) Chevrolet Cavalier, (8) Pontiac Grand Am, (9) Ford Tempo, (10) Saturn, (11) Toyota Corolla, (12) Chevrolet Corsica-Beretta, (13) Nissan Sentra, (14) Buick LeSabre and (15) Cadillac Deville. *Id.* at 21.

9 According to the respondents, based on 1983 and 1992 unit sales, the Herfindahl-Hirschmann Index ("HHI") for car manufacturing has declined from 2455 to 1959 for the United States and from 2,363 to 1,859 for North America. Petition at 5. The amount of the decline in the HHI between 1983 and 1992 (about 500 points) is greater than the increase that would have resulted from a full merger between GM and Toyota in 1983 (about 480 points). Although the HHI has declined to 1959, the respondents' figures show that it remains above 1800, the level at which the 1992 Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) paragraphs 13, 104, at Section 1.5, define a market as highly concentrated.

10 GM had 43% of North American automobile sales in 1984. Glassman & Cronin, Economic Justifications for Authorizing Unrestricted Production of Automobiles by NUMMI 8-9 (June 29, 1993), submitted in support of respondents' Petition.

11 GM's share of North American car sales was 33.4% in 1992. In 1984, GM produced cars in 24 facilities in the United States and Canada; in 1992, GM had 18 plants in the United States and Canada and one in Mexico. GM expects to close additional plants by 1996. Petition at 5.

followed by Ford (21.6%), Honda/Acura (9.4%), Toyota/Lexus (9.3%), Chrysler (8.3%), Nissan/Infiniti (5%) and VW/Audi (1.1%).[12] In 1992, 12 Japanese and 2 European transplant car assembly plants operated in North America (including Mexico).[13] The transplant assembly plants operated by Japanese car manufacturers, either directly or through joint ventures, during the period from 1982 through 1989, have added more than 2.5 million units of production capacity in North America. Hyundai, a Korean car manufacturer, sold more than 1.2 million cars in North America between 1986 and 1992 and in 1989 opened a plant in Quebec with a capacity of 100,000 vehicles.[14] The transplant operations for the most part emphasize smaller cars, and their presence in North America ensures that their ability to expand sales is not limited by export restrictions.[15] Imports from other countries, including Korea, Mexico and Brazil, amounted to 412,471 cars in 1992.[16] Honda, Toyota and Nissan have expanded into new market niches by marketing Acura, Lexus and Infiniti cars in the "luxury" segment of the market.

A number of joint ventures and other cooperative arrangements between automobile manufacturers have been formed since 1984. Ford and Mazda formed Auto Alliance International, Inc., a joint venture that assembles small cars (Ford Probe, Mazda MX6 and Mazda 626) in a plant in Flat Rock, Michigan.[17] Ford and Mazda also cooperate in other areas. For example, Ford makes the Mazda Navajo sport-utility vehicle, which competes with Ford's Explorer,

---

12 The transplant assembly plants in the United States accounted for 25% of 1992 U.S. car production. 1993 Market Data Book at 12.

13 In addition, BMW and Mercedes Benz recently have announced plans to build plants in the United States, with a combined announced capacity of 120,000 cars. Petition at 5.

14 Petition at 4 and Tab 10.

15 In 1984, when the order was issued, voluntary restraint agreements ("VRA") limited the number of cars that could be imported from Japan for sale in the United States. The VRAs expired in 1985. Since 1985, the government of Japan has implemented voluntary export restraints ("VER"). In recent years, the number of cars exported from Japan to the United States consistently has fallen below the VER limits. *See* 1993 Market Data Book at 4.

16 Petition, Tab 11.

17 Ford has a 25% equity interest in Mazda. Petition at 6.

and Mazda and Ford collaborated on the development of Ford's subcompact Escort.[18] Ford recently formed a "cooperative association" with Nissan, Japan's second largest automobile producer (after Toyota), to produce Mercury Villager and Nissan Quest minivans at Ford's plant in Avon Lake, Ohio.[19]

In 1985, Chrysler and Mitsubishi Motors Corporation established Diamond-Star Motors to produce cars.[20] Although Chrysler sold its interest in Diamond-Star to Mitsubishi in 1991,[21] the two companies continue jointly to develop models produced by Diamond-Star. Chrysler distributes Japanese-made Mitsubishi vehicles in the United States, and Chrysler and Mitsubishi collaborate in design, engineering and manufacturing technology and know-how. Subaru and Isuzu[22] have established a North American assembly joint venture, Subaru-Isuzu Automotive, Inc. ("SIAI"). SIAI has a plant in Lafayette, Indiana, with an annual capacity of about 169,000 units.[23] GM and Suzuki[24] are partners in a joint venture called CAMI Automotive, Inc. CAMI's plant in Ontario, Canada, with an annual capacity of 205,000 cars, makes Chevrolet Geo Tracker and Metro vehicles for GM.[25]

Since the inception of NUMMI, GM has continued to make small cars (the "J" car (Chevrolet Cavalier and Pontiac Sunbird)) and has added two families of compact cars to its fleet (the "N" car

---

[18] Petition, Tab 12 ("How Ford and Mazda Shared the Driver's Seat," Business Week, March 26, 1990, at 94).

[19] Petition, Tab 13 (A. Harmon, "A Van Vanguard; Ford, Nissan Overcome Distrust To Build Their First Vehicle Together," Los Angeles Times, July 20, 1992, at Dl).

[20] Diamond-Star began making small cars in the U.S. in 1988. In 1991, it was making the Mitsubishi Eclipse and Mirage, the Plymouth Laser, and the Eagle Talon and Summit at its Normal, Illinois plant. Petition, Tab 14 ("Chrysler, Mitsubishi Motors Agree to Major Restructuring of Diamond-Star Joint Venture," PR Newswire, October 29, 1991).

[21] Chrysler has a 5.9% equity interest in Mitsubishi.

[22] GM owns a 38% equity interest in Isuzu. Petition, Tab 7 (Rogers Affidavit).

[23] In 1992, SIAI produced 57,623 Subaru Legacy sedans and station wagons. The plant also produces Isuzu pickup trucks and sport-utility vehicles. Petition at 7.

[24] GM owns a 5.3% equity interest in Suzuki. Petition, Tab 7 (Rogers Affidavit).

[25] Petition, Tab 7 (Rogers Affidavit). In 1992, CAMI produced 96,404 small cars, the Geo Metro and the Suzuki Swift. 1993 Market Data Book at 10.

(Pontiac Grand Am, Oldsmobile Achieva and Buick Skylark) and the "L" car (Chevrolet Corsica and Beretta). GM produced more than 9 million " Y," "L" and "N" cars in the United States between 1985 and 1992, which is more than ten times the number of cars that NUMMI produced for GM during the same period. Petition at 14-15. In 1985, GM created the Saturn Corporation, which began making cars in 1990. The Saturn plant in Spring Hill, Tennessee, currently makes 240,000 cars annually, and GM plans to increase production to more than 300,000 units by the end of 1993.[26] In addition, in the last six years, Toyota has built two plants in North America, in Georgetown, Kentucky and Cambridge, Ontario, Canada. After completion of an expansion at the Georgetown plant, Toyota will have a North American capacity of 500,000 vehicles annually.[27] The changes in the industry that are described above are changed circumstances that eliminate the need for the order's limitations on the output and the duration of the joint venture. Entry and expansion in the automobile market in North America, although costly and time-consuming, have occurred on a significant scale. In the face of such entry and expansion, the joint venture is unlikely to create or facilitate the exercise of market power.[28] In addition, the development by GM of the Saturn line of cars is a significant change that eliminates the concern that the establishment of NUMMI would deter independent development and production of small cars in North America by GM. GM's substantial investment in Saturn, the increasing presence of transplant operations and the substantial increase in small car models available to consumers since 1984 all

---

[26] Although the Commission has at times looked skeptically at certain evidence of post-acquisition exculpatory conduct that is within the control of the respondent, *see, e.g., B.F. Goodrich*, 110 FTC 207, 340-42 (1988), GM's substantial investment in Saturn Corp., both in terms of dollars (more than $2 billion in the Tennessee plant and. a similar amount in marketing the Saturn line) and good will, and Saturn's success in the market suggest that GM is unlikely to abandon the Saturn line in favor of output from NUMMI. In 1992, only two years after beginning production, the Saturn line of cars accounted for almost 8% of GM's total sales.

[27] Petition, Tab 8 (Yasuda affidavit).

[28] *See* 1992 Horizontal Merger Guidelines Section 3.0; *Genstar Limited*, 104 FTC 264, (1984) (order modified on showing of expansion and entry in the relevant market that eliminated need for order restriction); *cf. Louisiana-Pacific Corp.*, 112 FTC 547, 559 (1989) (no claim of changes in structural characteristics of market, such as ease of entry, that might obviate need for remedy provided by order).

suggest that the basis for the concern reflected in the complaint and order about diminished competition in the small car market has been eliminated. There appears to be no continuing need for the order's restrictions on the duration and scope of the joint venture, and continuing the restrictions in the context of the changed conditions may hinder the ability of the joint venture to respond to consumer demand.

The Commission has determined that the changes in the industry are significant changes that eliminate the need for the order's limitations on the output and the duration of the joint venture. Accordingly, the order should be reopened and paragraphs II and III of the order should be set aside.

In addition to the changed conditions of fact that have eliminated the need for the order's limitations, GM and Toyota also assert significant efficiencies that have been realized and that will continue to be realized if the order is set aside and the joint venture is not terminated.[29] The record appears to show that NUMMI may be one of the more efficient assembly plants in the United States.[30] GM states that it is continuing to reap thebenefits of gaining first-hand experience with an efficient production system.[31] Moreover, the parties assert that permitting NUMMI to continue its operations beyond 1996 will facilitate GM's efforts to reduce costs and give GM continued access to small cars, consistent with the recognition that NUMMI benefits GM by enabling it to obtain a low-cost

---

29 The respondents state that NUMMI is a successful project of comparative labor/management relations that facilitates GM's efforts to learn the Toyota Production System, supplies the market with more than 300,000 high quality, low cost vehicles annually and diffuses trade frictions. Petition at 8-12. Because the Petition is granted on the ground of changed conditions of fact, the Commission need not address the question whether the public interest justifies the requested relief, including any efficiencies.

30 Petition, Tab 1 (Convis Affidavit) (describing NUMMI's efficiency efforts). *See* Petition at 9 (referring to studies by industry authorities, management experts and academicians that show NUMMI's efforts to improve efficiency); Petition, Tab 16 at 97 (case study of NUMMI appearing in the February 1993, Harvard Business Review concluding, in part, that NUMMI "has succeeded in employing an innovative form of ... time-and-motion regimentation on the factory floor not only to create world-class productivity and quality but also to increase worker motivation and satisfaction.").

31 Petition, Tab 6 (Mutchler Affidavit) (GM initially adopted "a piece-meal approach to the learning process"; in 1989-90, however, GM "began to understand that each element of the Toyota Production System is an essential part of the whole."). *See* Petition at 11 (GM states that it "is still the high cost producer in North America .").

domestic subcompact economy car.[32] Thus, NUMMI's benefits may well continue beyond 1996. Extending NUMMI will permit the continuance of any efficiency gains that benefit competition in the relevant markets.

IV. The Order's Restrictions on Communications Also Should Be Set Aside

Having determined to reopen the order on the ground of changed conditions of fact and to set aside the order's restrictions on the duration and output of the joint venture, we next consider whether the remaining provisions of the order should be retained. The order's limitations on the exchange of certain nonpublic information among GM, Toyota and NUMMI addressed the concern, alleged in the complaint, that the joint venture might facilitate noncompetitive cooperation between GM and Toyota. The respondents claim that the restrictions of the order impede the ability of the joint venture to do business. They also claim that communications between participants in other automobile industry cooperative ventures created since the order was issued are not similarly restricted and that, as a result, GM, Toyota and NUMMI are unable to communicate as do their competitors.

The provisions of the order were designed to restrict communications that might facilitate noncompetitive cooperation between GM and Toyota, while permitting communications necessary to accomplish the legitimate purposes and functioning of the joint venture. The respondents have shown that, in some circumstances, the specific limitations of the order impede the ability of the respondents and the joint venture to engage in legitimate activity. For example, the respondents have shown that the limitation on the exchange of information concerning the prices of component parts supplied to the joint venture prevents the joint venture from obtaining savings that may result from combining its market search activity with Toyota's, and from realizing cost savings to be

[32] Petition at 2, 11 (GM will be able to continue to obtain from NUMMI what it characterizes as a "high quality, low cost sedan -- the Prizm -- that is the flagship of the Geo distribution network").

generated by combining its purchases with Toyota's.[33] The provision of the order that bars GM from discussing marketing plans with Toyota or NUMMI allegedly has hindered the ability of the parties to realize market opportunities and increased their costs. For example, the respondents state that because GM was unable to tell NUMMI about a potential sale of cars in the fleet market, GM was unable to persuade NUMMI to make a price concession that might have resulted in a transaction beneficial to all of the parties. On another occasion, according to the respondents, as a result of GM's perceived inability under the order to tell the joint venture about GM's plans to re-badge the Nova as the Geo Prizm, NUMMI wastefully spent funds on tooling that was specific to Nova and that later had to be scrapped.[34]

The respondents have shown that in the context of significant changed conditions in the industry, the restrictions in the order on business communications may increase the costs of the joint venture and hinder the ability of the respondents and the joint venture to respond to competitive conditions. At the same time, the communications that are limited by the order are not *per se* unlawful, and setting aside these provisions of the order will not excuse the respondents from compliance with laws that prohibit collusive activity in restraint of trade. *See General Railway Signal.*, 108 FTC 181 (1986) (modifying order). The Commission has concluded that in the context of the changed conditions in the industry, paragraphs IV and V of the order should be set aside to permit the respondents and NUMMI to engage in communications ancillary to and reasonably necessary for the operation of the joint venture.[35]

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that the Commission's order in Docket C-3132, issued on April 11, 1984, be and it hereby is set aside, as of the effective date of this order.

---

[33] Petition at 16-17

[34] Petition at 17-19; Kimura Affidavit; Rogers Affidavit.

[35] The recordkeeping requirements of the order are intended to assist the Commission in monitoring the respondents' compliance with the order's restrictions on the exchange of information. If the order's restrictions on communications are set aside, the recordkeeping and other compliance requirements of the order (paragraphs VI through IX) also should be set aside.

CONCURRING STATEMENT OF COMIMISSIONER MARY L. AZCUENAGA

I concur in the decision of the Commission to reopen and set aside the order in this matter on the ground of changed conditions in the automobile industry that eliminate the need for the order. I do not endorse as relevant to this decision the purported efficiency gains from NUMMI alleged by GM and Toyota. *See* Order at 9-10.

GM and Toyota have asserted efficiencies that may or may not be realized in the future, if the respondents decide to continue their joint venture.[1] I hope that the asserted efficiencies will be realized and that NUMMI will indeed benefit competition, but these are not independent reasons for reopening and setting aside the order. Nor would it matter, in the context of determining whether the order should be reopened, if NUMMI were inefficient. If the projected efficiencies of the joint venture were not sufficient to forestall imposition of the order in the first place, how could the failure fully to achieve those efficiencies[2] or even their continuation justify setting the order aside?

The order of the Commission is not premised on the efficiency (or inefficiency) of the joint venture but rather on concerns, described in the complaint, about the potential effects on competition of noncompetitive cooperation between GM and Toyota. When we are persuaded that changed conditions of fact in the market have eliminated that concern, our task is done, and we need not speculate, in the context of a petition to reopen, about the parties' predictions of potential efficiencies.

GM and Toyota, in their business judgment, would prefer to continue their joint venture beyond the twelve years provided in the order, because they believe that it will be profitable. To accept this reason as a basis for reopening and setting aside the order would

---

[1] The order having been set aside, GM and Toyota will be at liberty at any time (as they were at liberty while the order was in effect) to discontinue their joint venture. The alleged "formidable regulatory, tax and logistical disadvantages to operating an auto plant in California," the "inherent difficulties in assembling vehicles" in the 30-year-old plant, the cost of required improvements to NUMMI's plant (expected to exceed $500 million), Petition at 13, and the fact that NUMMI "has not been consistently profitable," Kimura Affidavit at 1, may provide incentives for doing so.

[2] *See* Jennings Affidavit at 4; Mutchler Affidavit at 2.

relegate the decision whether to reopen final orders of the Commission to the business preferences of the respondent. The Commission has rejected this argument in the past, *see Louisiana-Pacific Corp.*, 112 FTC 547, 569 (1989) (rejecting as a basis for reopening the order the argument that retaining rather than divesting a profitable plant would enhance the respondent's ability to compete), and it should continue to do so.

I fully concur in the decision to reopen and set aside the order on the ground of changed conditions of fact.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

When the Commission accepted the consent order in this matter in 1984, it was generally recognized as a landmark effort to balance our dual responsibilities of vigorously enforcing the competition laws, while refraining from unnecessarily interfering with legitimate business activities. In light of marked changes in circumstances since that time, I believe that the Commission's determination to vacate the order today follows in the tradition of its original decision, and I strongly endorse it.

The Merger Guidelines recognize that the "larger universe" of combinations are "either competitively beneficial or neutral." Section 0.1.[1] As part of their Petition for reopening, the parties have presented an impressive array of information about the positive contributions of NUMMI, including assorted efficiencies that have resulted from the joint venture. While the Order (at 9-10 n.29) notes that "[b]ecause the Petition is granted on the ground of changed conditions of fact, the Commission need not address . . . any efficiencies," the Commission nonetheless proceeds to comment on this issue. Order at 9-10. Without meaning to disparage the parties' assertions in this regard, because of the basis for our decision, it is not necessary for the Commission, in my judgment, to evaluate, much less opine on, the existence, extent and effect of such efficiencies as part of this endeavor. Engaging *in dicta* is not without peril.

---

[1] U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines, *reprinted* in 4 Trade Reg. Rep.(CCH) paragraph 13 ,104 .

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3418. Consent Order, Mar. 16, 1993--Modifying Order, Nov. 8, 1993

This order reopens the proceeding and modifies the Commission's consent order issued on March 16, 1993 (116 FTC 184), by removing the requirements that the respondent hold separate and divest the international Renuzit assets to a Commission-approved acquirer. The Commission concluded that the hold separate and divestiture requirements are imposing costs on the respondent and that there do not appear to be any competitive reasons to retain the divestiture requirement.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

On July 8, 1993, S.C. Johnson & Son, Inc. ("Johnson") filed a Request To Reopen and Modify Consent Order ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The request was placed on the public record, and the thirty-day comment period expired on August 23, 1993. No comments were received.

In the request, Johnson asks that the Commission reopen and modify the order to eliminate any remaining obligation under paragraph II to divest the "Renuzit air freshener business outside the United States and all non-domestic territories or countries in North America, north of and including Panama, the Caribbean and Cuba" ("international Renuzit assets"). In the alternative, Johnson requests that the Hold Separate Agreement ("Hold Separate"), dated December 17, 1992, and made a part of the order, be terminated promptly since Johnson has completed the sale of all of the North American Renuzit assets.

The order defines the "Renuzit Assets" as including all of Drackett's right, title and interest in and to both its air freshener products business, including the "Renuzit" brand, and its furniture care products business, including the "Endust" and "Behold" brands.[1] The order only requires divestiture of the production facilities associated with either air freshener or furniture care products if desired by the acquirer. In defining the Renuzit Assets, the order does not distinguish domestic assets from international assets nor does it exclude the international Renuzit assets from the divestiture and hold separate requirements. The complaint identified the relevant geographic market for continuous and instant action air fresheners products as being the United States.

On May 14, 1993, the Commission approved Johnson's divestitures of the Endust and Behold furniture care products business to Sara Lee Corporation ("Sara Lee") and the North American Renuzit air freshener products business to The Dial Corp. ("Dial"). As it lacked international operations, Dial did not acquire the international Renuzit air freshener business from Johnson, and following the divestitures on May 18, 1993, Johnson retained the international Renuzit assets.

Johnson asserts that reopening and modifying the order to eliminate Johnson's obligation to divest the remaining international Renuzit assets will serve the public interest. The international Renuzit assets, which were not included in the divestiture to Dial, consist of certain air freshener patents, trademarks, inventory and technology necessary to market Renuzit air freshner products outside of North America. Johnson does not request a reopening

---

[1] Paragraph I.G. of the order states: "Renuzit Assets" means all of Drackett's rights, title and interest in and to:

(1) Air freshener products, including, but not limited to the brands and trademarks "Renuzit," "Renuzit Adjustable," Renuzit Roommate," "Renuzit Freshell," "Renuzit Fragrance Jar," "Renuzit Aerosol,"and "Renuzit Fresh'n Dry";

(2) Furniture care products, including, but not limited to, the brands and trademarks "Endust" and "Behold," but excluding the brand and trademark "Mr. Muscle" outside the United States; and

(3) All of Drackett's assets and business associated with the development, production, distribution, and sale for resale of air freshener products and furniture care products and as further delineated in the subparagraphs of Schedule A, attached hereto and made a part hereof.

Part 2 of Schedule A lists assets that Johnson need not divest if the acquirer does not need them. *See* order, paragraph II.A.

and modification on the basis of a change of fact or law. Johnson claims that the requested order modification will have no impact on competition in the U.S. market for continuous and instant action air freshener products as defined in the complaint. Furthermore, Johnson argues that the remedial purposes of the order have been fully satisfied by the divestiture of the domestic Renuzit air freshener business to Dial.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and modifying the language of Schedule A, Part 2 of the order to relieve Johnson of any further obligation to divest the international Renuzit assets.[2] With the elimination of any remaining divestiture obligations, the Hold Separate will terminate by its terms. Accordingly, there is no need to modify the Hold Separate itself.

Reopening and Modifying a Commission Order

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.[3]

---

[2] In the Request, Johnson also proposes to acquire from Dial the existing Renuzit technology and related information reasonably necessary for Johnson to operate the international Renuzit business. The proposed acquisition covers "existing manufacturing specifications, process specifications, manufacturing formulas, toxicology data and reports, safety and other regulatory data, and any machinery specifications for equipment used to manufacture Renuzit air freshener products." Request, at 4. Johnson's proposal qualifies as an acquisition of "any assets used or previously used . . . in the manufacture or production of air freshener products." Order, VI(3). Therefore, prior Commission approval is required by the Order for this proposed acquisition. Because the international assets have no competitive significance in the domestic air freshener market and the proposed acquisition will not affect U.S. competition, the Commission is giving its approval to this acquisition by separate letter.

[3] *Cf. United States v. Louisiana-Pacific Corp.*, 967 F. 2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq., (March 29, 1983) (unpublished), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.[4] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[5]

---

[4] The Commission may properly decline to reopen an order if the request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires respondents to submit affidavits in support of petitions to reopen and modify.

[5] *See Federated Department Stores Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

The Order Should Be Reopened and Modified

Johnson has shown that public interest considerations warrant reopening and modifying the order to remove its obligations to divest the international Renuzit assets and abide by the Hold Separate.[6] Johnson appears to have met its burden of showing a threshold injury caused by the continued operation of the order. Johnson claims that in view of the divestiture to Dial of the North American Renuzit assets, of Dial's lack of interest in acquiring the international Renuzit assets and of the allegation in the complaint that the relevant geographic market is the United States, the requirement of the order that Johnson hold the international Renuzit assets separate and divest them is causing it unforeseen harm and having a negative impact on Johnson's ability to compete. Johnson also asserts that there is an affirmative need to release it from its obligation to divest these assets in order to remove the impediment to competition. Johnson argues that since it has completed the divestitures of substantially all of the Renuzit Assets, the Hold Separate has already achieved its purpose and the continuing harm from its application was not contemplated by the order.

In T&N plc, Docket No. C-3312 (November 6, 1991), the Commission found that respondent demonstrated an affirmative need to modify the order by showing that requiring T&N to divest remaining inventory not wanted by the acquirer could create an impediment to T&N's ability to compete effectively. The Commission further found that T&N demonstrated that the continued application of the hold separate requirements to the remaining inventory imposed considerable costs on respondent's operations and limited its ability to respond to changes in the market. In *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985), the Commission held that the costs associated with continuing a hold separate agreement after a respondent has complied substantially with the divestiture requirements of the order are relevant in determining whether to reopen and

[6] As previously noted, Johnson does not request a reopening and modification on the basis of a change of law or fact.

modify an order on public interest grounds. The continued costs that Johnson will incur by the continued application of the divestiture and hold separate requirements of the order compare closely to the costs that the Commission recognized as the threshold injury showings in T&N and Chevron.

There appears to be no reason to retain the requirement that Johnson divest the international Renuzit assets. Because Johnson has completed the divestiture of the North American Renuzit air freshener assets to Dial, the remedial purposes of the order have been fully accomplished. The complaint identified the relevant geographic market in this matter as the United States, and the divestiture to Dial of the domestic Renuzit business completely cured the competitive concerns raised by the complaint and order. The international Renuzit business appears to have no effect on competition in the U.S. air freshener market. No imports of international Renuzit products occur in North America. Thus, there is no need, based on domestic competitive concerns, to require Johnson to divest the international Renuzit assets.

Balancing the reasons favoring the requested modification against any reason not to make the modification justifies modifying the order in the public interest. The harm and costs to Johnson associated with the continuing divestiture and hold separate requirements seem significant. On the other hand, it does not appear that there would be any benefits to domestic competition from retaining the requirement to divest the international assets. Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets.[7]

---

[7] In T&N, *supra*, the Commission modified the divestiture requirements of the order to permit the respondent to retain inventory not wanted by the acquirer. In Chevron, *supra*, the Commission reopened and modified the order to eliminate the hold separate requirement after the respondent had completed the majority of the divestitures required by the order. In *Batus, Inc.*, Docket No. C-3099, 104 FTC 632 (1984), the Commission modified the order to excuse the respondent, which had been ordered to divest department stores sufficient to reduce its sales volume by $20 million, from divesting any additional department stores. The respondent had received Commission approval for divestitures totaling $17.9 million in sales volume, and the Commission determined that requiring an additional divestiture was unnecessary.

In conclusion, Johnson has made a sufficient showing that public interest considerations support its Request that the Commission reopen and modify the order to remove the requirements that it hold separate and divest the international Renuzit assets. The hold separate and divestiture requirements are imposing costs on Johnson. Moreover, there do not appear to be any competitive reasons to retain the divestiture requirement.

Accordingly, *it is ordered,* That the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That Schedule A, Part 2 of the order be, and hereby is, modified by including the following paragraph:

(6) The international Renuzit assets, which are comprised of the air freshener patents, trademarks, inventory and technology reasonably necessary to produce Renuzit air freshener products for sale outside of the United States and all non-domestic territories or countries in North America, north of and including Panama, the Caribbean and Cuba.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Because of its successful effort to fulfill the core obligations in the order, the respondent's obligation to divest the international Renuzit assets became extremely difficult and costly. Were this obligation intended by the Commission as fencing-in relief, or were it to support the core relief in the order in any way, the removal of that obligation would not be warranted by the respondent's petition. But because I am not aware of any remedial purpose served by this obligation, the considerable costs that it appears to impose on the respondent justify its removal. Accordingly, I concur in the decision to modify the order.